State Courts, Federal Courts, and International Cases

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I. INTRODUCTION

The world is growing more interdependent, with individual nations unable and indeed generally unwilling to avoid extensive contact with one another. America's expanding international contacts necessarily affect many social institutions, including the law. To meet the demands

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of this increased globalization, the American legal system requires a coherent analytical system for addressing cases with international elements. The current system, however, meets this demand only in part. While cases involving international treaties are not especially troublesome, American courts encounter analytical problems in cases involving customary international law. American courts have also experienced some confusion in addressing cases that, while they involve neither treaties nor customary international law, have significant international elements.

To be sure, an analytical framework has been suggested for cases having some international element but not involving treaties, i.e. cases based on customary international law or simply having an international aspect.[1] The approach adopted by some federal courts is to assert that customary international law is federal common law[2] — a claim echoed by the American Law Institute[3] — and also that "there is federal question jurisdiction over actions having important foreign policy implications,"[4] even in cases in which questions of international law are not at issue.[5]

This "federalizing approach" to international cases poses a number of problems. First, extended to their logical limits, these broad federal claims infringe upon state authority over subjects long understood to be matters for state law determination. Second, taken literally, these claims conflict with decisions of state courts and some federal holdings. Finally, federal jurisdiction over many of these claims depends on extremely weak arguments that raise separation of powers concerns.

Thus, serious difficulties inhere in the only analytical framework put forward to deal with nontreaty international cases. This Article proposes a new framework. Part II explains the basis for the federalizing approach to nontreaty international cases. Part III illustrates how equating customary international law with federal common law leads to federal — or international — supersession of state law to a surprising extent, and demonstrates that state courts have in fact rejected that doctrine. Similarly, Part IV illustrates the broad reach of some federal courts' assertions that domestic law cases with international elements must involve federal common law. This Part also demonstrates the

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1. These two groups of cases will hereinafter be collectively labelled "nontreaty international cases."

2. *See, e.g., In re* Estate of Marcos Human Rights Litig., 978 F.2d 493, 502 (9th Cir. 1992), *cert. denied sub nom.* Marcos-Manotoc v. Trajano, 113 S.Ct. 2960 (1993).

3. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1986) [hereinafter RESTATEMENT OF FOREIGN RELATIONS].

4. Republic of the Phil. v. Marcos, 806 F.2d 344, 353 (2d Cir. 1986), *cert. dismissed sub nom.* Ancor Holdings, N.V. v. Republic of the Phil., 480 U.S. 942 (1987), *and cert. denied sub nom.* New York Land Co. v. Republic of Phil., 481 U.S. 1048 (1987).

5. *See, e.g., Republic of the Phil.*, 806 F.2d at 344; Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994); Grynberg Prod. Corp. v. British Gas, P.L.C., 817 F. Supp. 1338 (E.D. Tex. 1993).

extent to which state courts and some federal courts have refused to accept broad federalization of cases that happen to contain international elements. Part V examines in detail the jurisdictional weaknesses of the argument that customary international law is federal common law. Part VI offers a new analysis of the place of customary international law in the American judicial system that analogizes customary international law to the law of a foreign sovereign and applies it accordingly. Finally, Part VII develops standards for determining when federal common law should displace state law in nontreaty international cases.

II. BASES OF THE FEDERALIZING APPROACH TO INTERNATIONAL CASES

Two related but distinct assertions underlie the federalizing approach to international cases. First, some federal decisions hold that customary international law is federal common law. Second, others in effect hold that cases touching on international relations to any extent must also involve federal law. These two positions are based on three lines of cases.

Filartiga v. Peña-Irala[6] is the leading opinion in the first line of decisions.[7] In this damage suit, two Paraguayan citizens alleged that one of their Paraguayan family members was tortured to death in Paraguay by the Inspector General of Police in Asunción, who was also a citizen of Paraguay.[8] The plaintiffs brought suit against the Inspector General in a federal court in New York after learning that he was in the United States.[9] They asserted that 28 U.S.C. § 1350, the Alien Tort Claims Act ("ATCA"), granted jurisdiction in the federal district court.[10] The ATCA grants jurisdiction to the federal district courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[11] The plaintiffs argued that because torture was a violation of customary international law, their claim alleged a "tort . . . in violation of the law of nations"[12] within the meaning of § 1350.[13]

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6. 630 F.2d 876 (2d Cir. 1980).

7. Cases relying on *Filartiga* for the proposition that customary international law is federal common law include United States v. Schiffer, 836 F. Supp. 1164, 1170 (E.D. Pa. 1993), *aff'd*, 31 F.3d 1175 (3d Cir. 1994); United States v. Buck, 690 F. Supp. 1291, 1297 (S.D.N.Y. 1966), *rev'd on other grounds*, 813 F.2d 588 (2d Cir. 1987), *cert. denied*, 484 U.S. 857 (1987); Ishtyaq v. Nelson, 627 F. Supp. 13, 27 (E.D.N.Y. 1983); Handel v. Artukovic, 601 F. Supp. 1421, 1426 (C.D. Cal. 1985); Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787, 798 (D. Kan. 1980), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981). *Cf.* Estate of Marcos, 978 F.2d at 502 (reaching result on this issue identical to that in *Filartiga* but not citing that case in support).

8. *Filartiga*, 630 F.2d at 878.

9. *Id.* at 878-79.

10. *Id.* at 880.

11. 28 U.S.C. § 1350 (1993).

12. *Filartiga*, 630 F.2d at 880 (quoting 28 U.S.C. § 1350 (1993)).

13. *Id.* at 880-85.

The defendant responded that federal courts had no jurisdiction over the plaintiffs' claim under Article III of the Constitution.[14] He noted that jurisdiction depended on establishing that cases involving customary international law were "cases . . . arising under the laws of the United States"[15] and argued that they were not. The jurisdictional question thus turned on the status of customary international law as part of U.S. law.[16]

The court held that application of the statute did not offend Article III. It cited scholarship on eighteenth-century legal history to show that the law of nations was considered an element of the common law at that time, and demonstrated that a primary motive for framing the Constitution was to unify the United States' approach to the law of nations.[17] The court also relied on certain diversity and admiralty cases in which the Supreme Court had applied the law of nations, quoting *The Nereide*[18] to the effect that international law is "'part of the law of the land'"[19] and *The Paquete Habana*[20] that "'[i]nternational law is part of our law.'"[21] It concluded that customary international law is federal common law, and that a suit based on customary international law thus arises under the "laws of the United States."[22]

Part V will analyze *Filartiga* thoroughly. At this point, it is enough to note that its reasoning is questionable. The decision fails to address, let alone distinguish, several Supreme Court decisions that appear contrary to its holding. Nor does it consider the potentially sweeping effect of the rule it applies. First, if customary international law is *federal* law, it must displace state law in the event of a conflict. Given the broad claims made in some quarters for the reach of customary international law, the likelihood of federal/state conflict is great. Furthermore, the *Filartiga* rule could alter the formulation of foreign policy because it implies that officials of the federal government would be bound, as a matter of domestic law, to adhere to customary international law.

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14. *Id.* at 885.

15. U.S. CONST., art. III, §2, cl. 1. None of the other headings of Article III were relevant. It was not suggested that the suit arose under the Constitution or a treaty of the United States, or that it involved foreign diplomats or admiralty jurisdiction. Furthermore, because all parties were aliens, the case fell outside Article III's grant of diversity jurisdiction. *See* Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 303 (1809) (holding Court lacks jurisdiction where both parties are aliens).

16. *Filartiga*, 630 F.2d at 886.

17. *Id.*

18. 13 U.S. (9 Cranch) 388 (1815).

19. *Filartiga*, 630 F.2d at 887 (quoting *The Nereide*, 13 U.S. at 422).

20. 175 U.S. 677 (1900).

21. *Filartiga*, 630 F.2d at 887 (quoting *The Paquete Habana*, 175 U.S. at 700). In addition, the court supported its claim to jurisdiction with a quote from *The Federalist* No. 3. "[T]reaties. . .will always be expounded in one sense and executed in the same manner, whereas adjudications on the same points and questions in the thirteen states will not always accord or be consistent." *Id.* at 886-87.

22. *Id.*

The second line of cases relevant to this article begins with *Banco Nacional de Cuba v. Sabbatino*,[23] which arose from the Cuban government's confiscation of sugar from an American-owned Cuban corporation. When the sugar was subsequently exported to New York and sold, the proceeds were transmitted to Sabbatino, the New York receiver of the corporation's assets, rather than to Banco Nacional, the Cuban government's representative. Banco Nacional then sued Sabbatino for conversion in federal district court in New York.[24] The case in the Supreme Court turned on the application of the act of state doctrine, the principle that "courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[25] The lower courts had ruled the doctrine inapplicable because Cuba allegedly violated customary international law by seizing the sugar.[26]

In deciding the effect of the act of state doctrine, the Supreme Court held that federal rather than state law governed the matter, even though jurisdiction rested on diversity of citizenship and despite the acknowledged similarity between the federal and New York approaches to act of state questions. The Court held that "a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law."[27] It referred approvingly to Judge Jessup's argument against leaving questions of international law to "divergent and perhaps parochial state interpretations,"[28] and discussed other circumstances in which the courts had developed federal common law.[29] It also supported its decision by citing in a footnote "[v]arious constitutional and statutory provisions" that "reflect[ed] a concern for uniformity in this country's dealings with foreign nations and indicated a desire to give matters of international significance to the jurisdiction of federal institutions."[30] The Court went on to hold that the act of state doctrine applied in this case even though Cuba's taking of the sugar allegedly violated international law. In explaining its position, the Court stressed the high degree of disagreement among governments regarding the legality of the type of action Cuba had taken and emphasized the need for the judiciary to avoid activity that might interfere with Executive Branch conduct of

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23. 376 U.S. 398 (1964). Cases relying on *Sabbatino* will be mentioned throughout.

24. *Id.* at 400-06.

25. *Id.* at 416 (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)).

26. 376 U.S. at 406-07.

27. *Id.* at 425 (footnote omitted).

28. *Id.* The article to which the Court was referring, Philip C. Jessup, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law*, 33 AM. J. INT'L L. 740 (1939), is discussed in detail below. *See infra* Part VI. Philip Jessup was an American judge on the International Court of Justice.

29. 376 U.S. at 426-27.

30. *Id.* at 427 n.25.

foreign policy.[31]

Sabbatino is central to an understanding of the federalizing approach for three reasons. First, it is the only Supreme Court authority for the proposition that federal common law encompasses foreign relations questions. It provides little guidance, however, as to the reach of this body of federal law. Second, the approving reference in dictum to Judge Jessup's article is the only support the Supreme Court has provided for the proposition that customary international law should be seen as federal common law. *Sabbatino* is ambiguous on this point, however, because it expressly refuses to apply international law to the facts before it. Finally, *Sabbatino* has lent itself to inaccurate characterization by courts employing the federalizing approach. For example, *Filartiga* cites *Sabbatino* — incorrectly — as a case "applying rules of international law uncodified in any act of Congress."[32]

The last line of cases relevant to this discussion derives from *Zschernig v. Miller*,[33] with additional influence from the earlier case of *Clark v. Allen*.[34] At issue in *Clark* was the application of a California statute that conditioned the rights of nonresident aliens to inherit property in California upon the reciprocal rights of American citizens to take property in the country of which the nonresident aliens were nationals and inhabitants.[35] Absent such reciprocity, alien heirs/legatees could not inherit under the statute; the property in question would pass to heirs other than the aliens in question or would escheat.[36]

The Attorney General of the United States argued that the Court should permit four German nationals to inherit real and personal property that had been left to them by a California resident of undetermined nationality.[37] He noted that the United States and Germany had entered into a treaty guaranteeing the rights of German beneficiaries of American wills to receive property. The Court agreed as to realty but rejected this argument as to personal property. In doing so, it read the treaty as applying only to personal property bequeathed to Germans by testators who were themselves German nationals, not to bequests to Germans from American citizens.[38] Because the nationality of the decedent had not been established, the Court remanded for a

31. *Id.* at 427-37.
32. 630 F.2d at 886-87.
33. 389 U.S. 429 (1968). This Article will describe cases relying on *Zschernig* throughout.
34. 331 U.S. 503 (1947).
35. *Id.* at 505-07.
36. *Id.* at 506 n.1 (describing California Probate Code § 259).
37. The case had originally been brought by the Alien Property Custodian, who had vested himself with the rights of the four Germans under the will and sought a declaration that the California statute would not affect the Germans' rights. At the time of argument before the U.S. Supreme Court, the U.S. Attorney General had succeeded to the functions of the Alien Property Custodian. *Id.* at 505-16.
38. *Id.* at 507-16.

determination of this question.[39]

As an alternative, the Attorney General argued that the statute was an unconstitutional extension of state power into the field of foreign affairs exclusively reserved to the federal government.[40] The Court rejected this argument as "farfetched."[41] It observed that local law governed rights of succession and held that, absent a treaty requiring a contrary result, negotiations between California and a foreign state, or California's entry into a compact with a foreign state, there was no basis for disregarding state policy. While the Court acknowledged that the statute would have "some incidental or indirect effect in foreign countries," it held such effects to be irrelevant.[42]

The Court decided *Zschernig* against this background. The decedent in *Zschernig*, an Oregon resident, had died intestate in 1962, leaving realty and personalty; all of his heirs were citizens of the German Democratic Republic.[43] Like California, Oregon conditioned the inheritance of property in Oregon by nonresident aliens on reciprocal rights of inheritance in the countries of which the aliens were nationals. The Oregon statute also required proof that such alien heirs would receive the "benefit, use or control" of the property at issue without confiscation.[44] The Oregon courts had held that the treaty between the United States and Germany construed in *Clark* protected the rights of the East German heirs in *Zschernig* to the realty portion of the estate. They also held, however, that the statute precluded their taking the personalty, which would escheat under the terms of the statute.[45]

The Supreme Court held the statute unconstitutional as applied, thereby reversing the Oregon courts as to the personalty. It observed that, in operation, the statute had led Oregon judges to inquire "into the actual administration of foreign law" and "the credibility of foreign diplomatic statements," and to speculate whether funds dispatched under the statute would actually be received.[46] The Court noted instances in which Oregon courts criticized Communist governments, sometimes dismissing the language of foreign statutes because the foreign governments promulgating them were "untrustworthy."[47] The Court strongly disapproved of state court criticism of foreign governments.[48] While it rejected state involvement in foreign relations, the Court was also at pains to distinguish *Clark* by explaining that *Clark* involved

39. *Id.* at 518.
40. *Id.* at 516-17.
41. *Id.* at 517.
42. *Id.*
43. *Zschernig*, 389 U.S. at 430.
44. *Id.* at 430 & n.1.
45. *Id.* at 431-32.
46. *Id.* at 434.
47. *Id.* at 437-40.
48. *Id.* at 441.

nothing more than "the routine reading of foreign laws."[49] The decision made clear that state courts were not precluded from reading, construing and applying the laws of foreign countries, but held that their role could not extend to passing judgment on foreign regimes.[50]

What then can be said of these three lines of cases? First, *Filartiga* clearly holds that customary international law is federal common law. Second, *Sabbatino* holds as clearly that the application of the act of state doctrine is a matter of federal common law because it regulates relations between the federal executive branch and the judiciary. Finally, *Zschernig* holds that too-minute inquiries by state court judges into the internal workings of foreign governments, as well as their expressions of opinions critical of such governments, amount to an unconstitutional intrusion by state officials into an exclusively federal domain. These rulings nevertheless raise a number of questions.

Later Sections in this Article address some of these questions. To understand why they are significant, however, one must first explore the potentially broad effects of federalizing customary international law and international cases generally.

III. CUSTOMARY INTERNATIONAL LAW AS FEDERAL COMMON LAW: THE DOCTRINE'S CONSEQUENCES AND THE STATES' REACTIONS

Filartiga's holding that customary international law is an element of federal common law, taken literally, would federalize a number of areas of law that have traditionally been under state control. This Section clarifies the scope of this potential change, advances reasons of principle against such a development, and demonstrates that state courts have been unwilling to subordinate themselves to international legal standards to the degree that *Filartiga's* holding would require.

A. *The Impact of Federalizing Customary International Law*

The proposition that customary international law is federal common law would profoundly affect the law of the states. It is hornbook law that "[i]f an issue is controlled by federal common law, this [body of law] is binding on both state and federal courts,"[51] and that "federal common law displaces state statutory as well as state decisional law."[52] *Any* rule of state jurisprudence must yield in the face of federal common law. Thus, if customary international law is federal common law, any rule of state law that conflicts with a rule of customary international law will be displaced.

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49. *Id.* at 432-34.
50. *Id.*
51. CHARLES A. WRIGHT, LAW OF THE FEDERAL COURTS 415 (5th ed. 1994).
52. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 224 (2d ed. 1993).

Given these propositions, it is important to identify what rights customary international law guarantees and what duties it imposes. Rights and duties under customary law are difficult to specify, however, because little agreement exists as to the proper method of demonstrating that a putative rule is one of customary international law. For example, the *Filartiga* court, in holding that the "law of nations" forbade states to torture their own citizens, relied on declarations by the U.N. General Assembly, the language of two regional human rights treaties, the provisions of one general multilateral human rights covenant, the constitutions of fifty-five countries forbidding torture, and the absence of any government's affirmative assertion of the right to torture its citizens. Though the court noted that customary international law derives from the behavior of nations, it rejected the suggestion that the regular use of torture by a number of states was legally significant and asserted that violations of a legal norm do not destroy the norm.[53] Employing a similar approach, Professor D'Amato has argued that the generalizable provisions of a multilateral treaty attain customary international law status upon the treaty's conclusion absent language to the contrary in other treaties.[54] Although respectable authorities have seriously questioned the legal basis for using such methods to determine the content of customary international law,[55] whether *Filartiga*'s or Professor D'Amato's analyses are ultimately correct as a matter of international law is not the only consideration: litigants may invoke support from such authorities to argue that a given legal rule has customary international law status and thus insulate themselves from accusations of proceeding frivolously.

The differing methods of determining the content of customary international law produce different lists of rights protected by that body of law. The *Restatement of Foreign Relations* asserts that a government violates customary international law if as a matter of policy it practices, encourages, or condones genocide, slavery, "disappearances," torture, or other cruel, inhuman, or degrading treatment or punishment. In addition, the *Restatement* asserts that international law forbids prolonged arbitrary detention, systematic racial discrimination, and patterns of gross violations of internationally recognized human rights.[56]

Professor Sohn has gone further by arguing that both the Universal Declaration of Human Rights[57] and the International Covenant on Civil

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53. *See Filartiga*, 630 F.2d at 880-84, 884 n.15.

54. ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 123-45 (1987).

55. *See* Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 84-98 (1992).

56. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 3, § 702.

57. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

and Political Rights[58] have passed into customary international law.[59] These instruments set out a longer list of rights than does the *Restatement of Foreign Relations* and address several additional subjects. For example, Article 24 of the Universal Declaration provides that "[e]veryone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay."[60] Article 25(1) adds:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[61]

The International Covenant deals with fewer subjects than does the Universal Declaration and, in most of its articles, imposes requirements similar to those of the U.S. Constitution. Its Article 6(5), however, forbids imposition of the death penalty for crimes committed by persons under eighteen years of age.[62]

Finally, the methodologies of the *Filartiga* court and Professor D'Amato may generate still longer lists of rights protected by customary international law. For example, if one accepts Professor D'Amato's argument that generalizable provisions of multilateral treaties are *ipso facto* rules of customary international law, then the substantive provisions of the Convention on the Elimination of All Forms of Discrimination Against Women[63] are rules of customary international law. That convention requires "appropriate measures" to root out "prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."[64] As customary international law, the convention (and, according to Professor D'Amato's argument, all other human rights conventions) would by extension apply to the states as federal common law. Needless to say, the collective application of such treaties would force fundamental changes in state law.

The obligations imposed on the states through the application of customary international law as federal common law could thus be extremely far reaching. To be sure, even a court equating customary international law with federal common law would not necessarily label

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58. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter International Covenant].

59. Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 17, 32 (1982).

60. Universal Declaration, *supra* note 57, art. 24.

61. *Id.* art. 25(1).

62. International Covenant, *supra* note 58, art. 6(5), 999 U.N.T.S. at 175.

63. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

64. *Id.* at 17, art. 5.

all of the Universal Declaration of Human Rights or all treaty provisions as customary international law. However, while such a result would not *necessarily* follow from the belief that customary international law is federal common law, a court inclined to reach that result could easily find authority to support it.

In sum, depending on the method it employs to determine the content of customary international law and, therefore, federal common law, the federalizing approach could lead to the displacement of rules of state law encompassing a broad range of subjects.

B. *Customary International Law as Federal Common Law: Contrary Arguments, Inconsistent Cases*

The potentially widespread effect of treating customary international law as federal common law would lead to great changes in the existing legal system. While change is not necessarily bad, at least two grounds for questioning the desirability of treating customary international law as federal common law appear significant in this case.

The first reason for concern is that such a step could displace the law of an American state without action by that state's government or by any branch of the federal government, including the judiciary. This automatic displacement is possible because customary international law can develop without the participation of all countries; it requires only a *general* practice of states and can thus bind governments that have simply failed to object while a practice was becoming a legal rule.[65] Such legal rules would be binding on citizens and U.S. courts even if the U.S. government had not contributed to their evolution. Rules of customary international law that developed without American participation would thus supersede both state common and statutory law.

This result is troubling. Displacement of state law that conflicts with the federal Constitution or a federal statute fits comfortably into Americans' understanding of the limits federalism imposes on state autonomy. However, displacing state law with a rule that may have come into existence without the participation of any U.S. official does not square with American majoritarian assumptions about the sources of law, as Professor Trimble has noted.[66]

While Professor Trimble considered the negative impact that domestic integration of customary international law would have at the federal level, his concerns are equally applicable to the displacement of state law.[67] Indeed, his arguments apply with more force in the state context. After all, the federal government has the ability to influence the

65. Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 679-80 (1986).

66. *See id.* at 718-21.

67. *See id.*

formation of customary international law through its participation in the law-making process. Individual American states have no such opportunity. Thus, issues overlooked by the federal executive but of great importance to a small number of states may be controlled by a federalized rule of customary international law that the inhabitants of those states could in no way affect.

While Professor Brilmayer disagreed with this position,[68] her objections do not address the problems that arise when customary international law displaces state law in a purely domestic case. Brilmayer's contention that the use of international law by courts often raises no countermajoritarian difficulties[69] cannot apply to cases in which a *customary* law rule displaces a statute. Her observation that international law defines certain powers of the elected branches[70] is most applicable to organs of the federal government, not to state governments. She also argues that because customary law depends on the consent of the countries comprising the international system, it raises no more of a countermajoritarian problem than do treaties.[71] Treaties, however, become binding only after some affirmative action by the President and the Senate. In contrast, a rule of customary law could apply to the United States even where American officials remained silent during its formation.

This countermajoritarian concern is exacerbated by the second difficulty that treating customary international law as federal common law presents for the states: some methods for determining the content of customary international law yield a long list of subjects governed by that law. Treating customary international law as federal common law could thus affect a surprising number of state cases. If one accepts the proposition — advanced by a number of respectable authorities — that customary international law imposes duties on individuals and protects them from certain actions by their own governments, then a case need present no obvious international element to raise a question of international law.[72] Not only would state law be subordinate to norms developed in the face of U.S. reticence, but these norms could also govern a tremendously wide range of substantive issues.

C. *State Court Failures to Follow the* Filartiga *Line*

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68. Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2309-11 (1991).

69. *Id.* at 2310.

70. *Id.*

71. *Id.*

72. Numerous authorities take this position. Regarding international protection of human rights generally, see *Filartiga*, 630 F.2d at 881-84 (prohibition of torture); RESTATEMENT OF FOREIGN RELATIONS, *supra* note 3, §§ 701-02; Richard B. Bilder, *An Overview of International Human Rights Law*, *in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 3 (Hurst Hannum ed., 2d ed. 1992). Regarding duties imposed on individuals, see IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 561-64 (4th ed. 1990).

Aside from the arguments counseling against treating customary international law as federal common law, case law clearly illustrates the impracticality of this proposition. State courts do not, in fact, treat customary international law as federal law.

If customary international law were federal common law, state courts would be compelled to apply the international legal rules whenever litigants made claims grounded in customary international law, regardless of whether the rules were contrary to state law. Of course, the state court might determine that the international legal rule did not apply on the facts, but it could not reject the relevance of customary international law out of hand and act consistently with the proposition that federal common law includes customary international law.

In practice, state courts faced with arguments that customary international law displaces provisions of state law have generally adhered to state law. They have been especially hostile to customary international law defenses in criminal trespass actions against antiwar protestors. For example, in *Yoos v. State*[73] the court rejected the defendants' argument that their protest against Trident missiles at the Kennedy Space Center was necessary to prevent the commission of a war crime or a crime against humanity.[74] In doing so, the court held: "International law is not paramount to, and does not in any way supersede, Florida criminal law. Accordingly, international law does not provide a valid legal defense to a violation of the criminal laws of this state."[75] Similarly, *State v. Marley* upheld trespass convictions of Vietnam war protestors who refused to leave a weapons plant even though the defendants argued that the weapons manufactured at the plant were illegal under various international theories.[76] The Supreme Court of Hawaii held that customary international law did not take precedence over state criminal statutes. It quoted *Skiriotes v. United States*[77] for the proposition that:

> International law is a part of our law and as such is the law of all States of the Union . . . but it is a part of our law for the application of its own principles, and these are concerned with international rights and duties and not with domestic rights and duties.[78]

Yoos and *Marley* stand for the proposition that international law does not displace state law and thus imply that international law is not federal

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73. 522 So. 2d 898 (Fla. Dist. Ct. App. 1988) (per curiam).
74. *Id.* at 899.
75. *Id.*
76. State v. Marley, 509 P.2d 1095, 1099 (Haw. 1971).
77. 313 U.S. 69 (1941).
78. 509 P.2d at 1107 (quoting *Skiriotes*, 313 U.S. at 72-73). The Hawaii court reasoned that because, under *Skiriotes*, a state may regulate the conduct of citizens outside its territory, *a fortiori*, a state can regulate its citizens' behavior within its territory regardless of international law. *Id.* at 1107. The *Marley* court seems to have misread *Skiriotes*, which appears to hold that the state action questioned was permitted by international law, not that international law was irrelevant in purely domestic matters. *See* 313 U.S. at 73-74, 77-79.

common law.[79]

The California court gave more credence to customary international law arguments by antinuclear weapons protestors in *In re Weller*.[80] These defendants argued that their trespassing was necessary because international law obliged them to prevent the development of the Trident missile.[81] Unlike the *Yoos* and *Marley* courts, the California court analyzed the defendants' arguments on the express assumption that customary international law imposed on them an affirmative duty to interfere with the development of the Trident.[82] *Weller* nonetheless held that, even if international law requires affirmative action to prevent some activity, it does not justify affirmative *illegal* action.[83] The court noted that a democratic country need not "excuse violations of its laws by those seeking to conform their country's policies to international law"; defendants were therefore consigned to seeking their objectives through the ballot box or through court action.[84]

This conclusion follows only if international law does not displace the law of an American state. Otherwise, the court would have had to determine the precise contours of the defendants' international duty and satisfy itself that they could fulfill that duty by activity consistent with state law. Surely, if international law is paramount, the illegality of an act under state law is irrelevant if international law requires it. The court's conclusion in *Weller* necessarily assumes that international law is not paramount — that it is not federal common law.

Clearly, state courts, at least in the criminal law context, are unwilling to subordinate state law to customary international law. While *Yoos*, *Marley*, and *Weller* differ in their reasoning and understanding of customary international law, each implicitly rejects the proposition that a rule of customary international law displaces a contrary law of an American state.[85]

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79. Other state courts have relied on *Marley*. *See, e.g.*, State v. Champa, 494 A.2d 102 (R.I. 1985). In *Champa*, the Rhode Island Supreme Court cited *Marley* for the proposition that a claim that one's own government has violated its treaty obligations raises a political question the courts should not decide. The court ignored the defendants' argument that customary international law forbids any cooperation with an agency producing nuclear weapons. *Id.* at 104-05. By relying on the portion of the *Marley* opinion dealing with treaties rather than on the part addressing customary international law, *id.* at 104-06, the court seemed to reject the position that customary international law, as federal common law, is binding on the courts of the states.

80. 210 Cal. Rptr. 130 (Cal. Ct. App. 1985).

81. *Id.* at 131.

82. *Id.* at 133.

83. *Id.*

84. *Id.*

85. Recent U.S. Supreme Court holdings also impugn the status of customary international law as federal law. *See, e.g.*, United States v. Alvarez-Machaín, 112 S. Ct. 2188, 2196 n.15 (1992) ("[T]he practice of nations under customary international law [is] of little aid in construing the terms of an extradition treaty, or the authority of a court to later try an individual who has been so abducted."); Stanford v. Kentucky, 492 U.S. 361, 396 n.1 (1989) (rejecting relevance of foreign capital punishment practices and expressly considering only American conceptions of propriety of executing persons for crimes committed as juveniles).

IV. CASES INVOLVING FOREIGN RELATIONS AS FEDERAL COMMON LAW: CASES AND ARGUMENTS PRO AND CON

As noted in the Introduction, the federalizing approach goes beyond the proposition that customary international law is federal common law. Some federal courts have also asserted that federal common law must govern cases affecting the foreign relations of the United States whether or not customary international law is involved. Depending on how one defines the concept of "foreign relations," the potential scope of this doctrine is vast. Federal courts relying on *Sabbatino* or *Zschernig* as authority for displacing state law have held that federal law governs in a wide variety of circumstances. These opinions, however, do not represent a consensus among federal judges.[86] Some federal courts have reached results contradicting these cases, while others have dealt with related cases in ways that are hard to reconcile with the "foreign means federal" approach. This unwillingness to see all international cases as federal is also supported by state authority and by arguments of principle.

A. *"Foreign Relations Cases" as Federal Common Law*

Several cases suggest that federal law applies in cases where a "foreign relations" issue is present. These decisions are important, not because federal courts always follow the reasoning employed here, but rather because they show the extremes to which federal courts have gone in foreign relations cases and the difficulty of limiting the idea that cases with international elements are necessarily federal.

In the area of conflicts of law, some federal courts have called for displacing state law rules with federal rules due to perceived federal interests. In *Republic of Iraq v. First National City Bank*,[87] the Second Circuit held that the enforceability of a confiscatory decree issued by the new Iraqi republican government against its late king's New York assets was a matter of federal law. The act of state doctrine did not apply to the decree, according to the court, because the assets were located within the United States at the time of the confiscation.[88] Moreover, the degree of respect to which the decree was entitled was necessarily a matter of federal law, as the nation must "speak with a united voice"[89] on foreign acts of state affecting property in the United States in order to avoid "needlessly complicat[ing] the handling of . . . foreign relations."[90] Because confiscatory actions were contrary to the public policy of the United States, the court refused to give effect to the Iraqi

86. For further discussion of this point, see *infra* part IV.B.
87. 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).
88. *Id.* at 51.
89. *Id.* at 50.
90. *Id.*

decree.[91]

The court's holding in *Republic of Iraq* could be seen as requiring a federal conflicts of law rule regarding foreign actions purporting to affect property within the United States. Other cases evince judicial support for the related principle that federal conflicts law governs whether American courts should enforce the judgments of foreign courts even though state conflicts rules normally apply in this area. In both *Her Majesty the Queen in Right of the Province of B.C. v. Gilbertson*[92] and *Tahan v. Hodgson*,[93] federal courts suggested that the enforceability of a foreign court judgment is a question of federal rather than state law.[94]

The court in *Exxon Corp. v. Chick Kam Choo*[95] likewise applied federal policy in an area normally left to the states where the basis of the claim — maritime law — gave the case a federal character. The alien litigant in *Chick Kam Choo* had had her federal suit dismissed on the basis of *forum non conveniens*.[96] She refiled her case in state court in reliance on a state statute prohibiting dismissal on *forum non conveniens* grounds.[97] In response, the state court defendant obtained an injunction against the state court proceeding from the federal district court.[98] The court of appeals upheld the injunction. It cited *Zschernig* and *Sabbatino* in explaining that "[f]ederal law controls the international role of all courts in the United States" and stressed the importance of the *forum non conveniens* concept in federal maritime law.[99] In essence, the court of appeals took a case out of state court to ensure that federal practice regarding *forum non conveniens* in maritime actions would control despite state policies.

The courts in these cases justified their conclusions that federal law applied by characterizing the legal issues involved as federal. In *Republic of the Philippines v. Marcos*, in contrast, the court held that federal law must govern because of the dispute's potential impact on U.S. relations with the foreign government litigant.[100] The Philippine government in *Republic of the Philippines* filed for an injunction in a New York state court in order to prevent the transfer of property it believed Marcos, the former dictator of the Philippines, had purchased with money stolen from the Philippine government and its citizens. The plaintiff sought to maintain the injunction until the question of ownership

91. *Id.* at 51-53.
92. 597 F.2d 1161 (9th Cir. 1979).
93. 662 F.2d 862 (D.C. Cir. 1981).
94. *Id.* at 868 (holding enforcement of all foreign court judgments matter of federal law); *Gilbertson*, 597 F.2d at 1163 & n.2 (holding enforcement of foreign court tax judgments matter of federal law).
95. 817 F.2d 307 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140 (1988).
96. *Id.* at 309 & n.1.
97. *Id.* at 309-10.
98. *Id.* at 309.
99. *Id.* at 321-25.
100. 806 F.2d at 354.

could be resolved, either by an American court or through appropriate proceedings in the Philippines.[101]

The defendants[102] removed the case from the New York courts to the federal courts, and the Philippine government supported the claim that federal jurisdiction existed because the case arose under federal law.[103] The court of appeals agreed. Citing *Sabbatino*, the court observed that the "plaintiff's claims necessarily require determinations that will directly and significantly affect American foreign relations,"[104] and asserted that "there is federal question jurisdiction over actions having important foreign policy implications."[105] The court stressed that the Philippine government had requested that governments of other countries freeze the Marcoses' assets within their territories, and observed:

> Whether any confiscatory action by the Philippines will be entitled to credit in the United States courts is a question for another day, but it is surely a question that will be governed by federal law within the original jurisdiction of the court under section 1331 of the Judicial Code.[106]

Although the complaint relied on a theory closer to a state law claim for conversion than on federal common law, the court held that "an action brought by a foreign government against its former head of state arises under federal common law because of the necessary implications of such an action for United States foreign relations."[107] Even if the federal interest was not strong enough to entirely displace any state cause of action, the court held that the state-created cause of action at least contained a federal issue. Furthermore, regardless of whether the overall claim involved state or federal law, the decision to honor or ignore a foreign government's request to freeze property within U.S. borders was necessarily a federal matter.[108]

Unlike the cases discussed earlier, the federal court's subject matter jurisdiction in *Republic of the Philippines* was contingent upon some aspect of the plaintiff's claim involving federal law. To conclude that federal jurisdiction obtained, the court reasoned as follows: Suits between foreign governments and their former rulers, or involving requests by foreign governments to freeze such rulers' assets in the United States, involve federal interests. The rule of law applied to

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101. *Id.* at 348-49.

102. The Marcoses and their agents did not appear in the action. The suit was defended by the corporate owners of record of the properties in question and by persons connected with those corporations.

103. *Id.* at 352.

104. *Id.*

105. *Id.* at 353.

106. *Id.*

107. *Id.* at 354.

108. *Id.* The court went on to evaluate the overall claim under both state law and federal common law. *Id.* at 355-56.

resolve suits involving federal interests must be federal law. Thus, such suits arise under federal law, not because they depend on any existing federal rule, but because whatever rule the court applies to decide the case becomes federal law by virtue of its use to decide this necessarily federal case. The court of appeals decision, however, provides no justification for automatically treating cases involving interests of the sort at issue in *Republic of the Philippines* as a matter exclusively for federal law.

Grynberg Production Corp. v. British Gas, P.L.C.[109] goes even further than *Republic of the Philippines* in using the "foreign means federal" approach. The defendant British Gas had agreed to jointly develop an oil field in Kazakhstan with the plaintiff but reneged after it received an oil-drilling concession from the Kazakh government.[110] The plaintiff sued for breach of contract and fraud and sought, in the alternative, specific performance of the agreement to develop the oil field in Kazakhstan, an injunction requiring British Gas to transfer the oil drilling concession to the plaintiff, or money damages to compensate for the defendant's conversion of the plaintiff's alleged rights to drill in the oil field.[111] The court upheld removal to federal court even though diversity jurisdiction did not apply. It held that a question of federal law was presented because the court would have to nullify the concession granted by the Kazakh government in order to grant the specific performance remedy, and only the federal common law of foreign relations could authorize a judicial remedy that would override an independent state's determinations regarding its own natural resources.[112] Similarly, the conversion claim depended on the illegality of defendant's receipt of the concession, and only federal law could support a determination that Kazakhstan's decision to award the concession was illegal.[113] Finally, the court reasoned that the injunction claim depended on federal law[114] because a number of the obvious defenses to the plaintiff's claim for an injunction involved federal common law (for example, the act of state doctrine), and the plaintiff would be required to refute these defenses under Texas law.[115] While the reasoning in this case is doubtful,[116] it clearly stands for the

109. 817 F. Supp. at 1338.
110. *Id.* at 1346.
111. *Id.* at 1358.
112. *Id.*
113. *Id.* at 1359-60.
114. *Id.* at 1353 (citing Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921)).
115. *Id.* at 1360-63.
116. The court's first basis for determining the existence of federal jurisdiction is its conclusion that only federal law could permit it to nullify the agreement between British Gas and Kazakhstan. *Id.* at 1358-59. Its second basis for jurisdiction likewise depends on the argument that only federal law could render unlawful an independent state's determinations regarding its own natural resources. *Id.* at 1360. Although the court relies on *Sabbatino* for the proposition that "claims raising questions of foreign relations are incorporated into federal common law," *id.* at 1355, the court identifies no authority supporting the proposition that federal law would either

proposition that a case involves federal common law when it contains some international element, even though the plaintiff makes no claim based on customary international law.

The plaintiff in *Grynberg* at least challenged the legality of a foreign government's actions. In *Sequihua v. Texaco, Inc.*,[117] the court held that the federal common law of international relations was involved even though no action by any foreign government was at issue. Ecuadoran citizens brought the suit against Texaco for environmental damage allegedly effected in Ecuador. The court held that the case involved the relationship between the governments of the United States and Ecuador although the plaintiffs and the defendant were private parties.[118] Specifically, the court stressed that the defendant's operations were highly regulated by the government of Ecuador and were carried out on government land.[119] It also noted that the trust fund for medical monitoring sought by the plaintiffs would effectively supplant the Ecuadoran Health Ministry.[120] Moreover, the Ecuadoran government had strongly protested the bringing of the suit.[121] Thus, the case necessarily involved the relationship between the government of the United States, through the court, and the government of Ecuador, and federal common law governed.[122] The court then dismissed the case on comity of nations and *forum non conveniens* grounds.[123]

Sequihua is an example of the breadth of some courts' claims regarding the reach of federal jurisdiction in cases with international elements. Such claims are far from uncontroversial, however. As the next section will demonstrate, numerous decisions of state courts, as well as some federal decisions, reject this expansive view.

B. *Arguments and Authority Inconsistent with a Broad Federal Common Law of Foreign Relations*

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permit nullifying the Kazakh concession grant or address the legality of that grant. Indeed, the argument that federal law could provide relief on either theory appears so weak as to trigger the rule requiring dismissal for lack of subject matter jurisdiction of claims ostensibly based on the presence of a federal question when a federal claim is plainly insubstantial. *See* CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3564 (2d ed. 1984). The Court's third justification for its assertion of jurisdiction is hard to understand. It depends on the conclusion that Texas law governed the availability of injunctive relief. *Grynberg*, 817 F. Supp. at 1359, 1361-62. However, because the court also holds that the plaintiff's right to the remedies it sought was dependent on federal law, *id.* at 1366, it would seem that the relevant standard for injunctive relief would be federal, not state. In other words, if the court's first and second arguments for federal subject matter jurisdiction are correct, the third is wrong; if the third is correct, the first and second are wrong.

117. 847 F. Supp. at 61.
118. *Id.* at 62.
119. *Id.*
120. *Id.* at 63.
121. *Id.*
122. *Id.* at 62-63.
123. *Id.* at 63-65.

The lower federal court decisions described above raise a number of problems. First, they lack any clear basis in principle. Moreover, a number of state and federal decisions conflict with their "foreign means federal" reasoning. Finally, these cases depend on a view of exclusive federal authority over cases touching on foreign relations that is contradicted by federal statutes.

To argue that federal common law must govern whenever a case implicates the international relations of the United States is to provide a basis for taking *all* cases with international elements out of the state courts. This result is most obvious with cases in which foreign governments or their officials are parties, or those in which foreign nationals are litigating over transactions that took place abroad. Yet even litigation involving transactions carried out entirely in the United States could affect international relations if the cases involve foreign participants who are unhappy with the suits' outcome. Similarly, foreign governments would be concerned about suits between Americans involving transactions in their states.

So sweeping a reduction of state court authority is hard to justify. The "foreign means federal" cases fail to specify what effects these cases would have on foreign relations that require their adjudication in a federal forum, nor do they explain how limiting state court jurisdiction will avoid these problems. The only justifications they offer for their results are references to *Sabbatino* and *Zschernig*. *Sabbatino*, to be sure, holds that federal law must govern some matters involving foreign relations, and *Zschernig* establishes the corollary that some state actions affecting foreign states and litigants unconstitutionally invade federal foreign relations authority. Neither case, however, provides much guidance as to the boundaries of the rule it asserts, and the cases described in Section A likewise lack all but conclusory justifications.

Not only do these federal cases fail to justify their limitations on state court jurisdiction, but they also ignore a number of state and lower federal court decisions holding states competent to apply their policies to some subjects touching on international relations. For example, *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*[124] held that in the absence of a "present policy of the executive branch of the United States Government," a state could apply its own policies regarding acquiescence in the confiscatory and discriminatory acts of a foreign government.[125] Therefore, the state court could hear a suit for a Ugandan bank's failure to honor the irrevocable letter of credit it had issued to the plaintiffs where the Ugandan government had ordered the action.[126] The court's reliance on the policy of the state, rather than federal policy, conflicts sharply with the reasoning in *Republic of Iraq*

124. 333 N.E.2d 168 (N.Y. 1975), *cert. denied*, 423 U.S. 866 (1975).
125. *Id.* at 173 (emphasis added) (citation omitted).
126. *Id.* at 170-71.

v. First National City Bank.[127] Similarly, the holdings in *Gilbertson* and *Tahan*, suggesting that the enforceability of foreign court judgments is a matter of federal law, conflict with other federal court holdings.[128]

In *Exxon Corp. v. Choo*,[129] a state court also applied its own law to an international case involving *forum non conveniens*, contrary to the holding in *Chick Kam Choo*.[130] After the U.S. Supreme Court reversed *Chick Kam Choo* on grounds unrelated to this Article, Exxon renewed in a Texas state court its argument that, as the case involved maritime law, federal *forum non conveniens* rules preempted those of Texas and required dismissal of the case. By relying on *American Dredging Co. v. Miller*,[131] a U.S. Supreme Court case involving purely domestic entities, the Texas Supreme Court rejected this argument.[132] *American Dredging* held that state courts hearing maritime cases were not obliged to apply federal *forum non conveniens* doctrine, which the Supreme Court described as a "supervening venue provision that does not bear upon the substantive right to recover, and is not a rule upon which maritime actors rely in making decisions about primary conduct."[133] Armed with this precedent, the *Choo* court held that federal *forum non conveniens* doctrine did not preempt Texas law. It reasoned that:

> since the Supreme Court has determined that *forum non conveniens* is not a characteristic feature of general maritime law and that the application of state *forum non conveniens* law would not materially disrupt a uniform or predictable feature of general maritime law, the potential impact on international and interstate maritime commerce is minimal.[134]

While the court acknowledged that *forum non conveniens* "implicates international accommodation and comity,"[135] it also expressed doubt that application of Texas law would interfere with international relations or commerce because the parties to the case were an alien private citizen and American and Liberian corporations.[136]

State courts have also rejected the "foreign means federal" principle applied in *Republic of the Philippines*. In *Islamic Republic of*

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127. *See supra* text accompanying notes 87-91.

128. *See, e.g.*, Island Territory of Curacao v. Solitron Devices, Inc., 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974). The case at bar was an effort by Curacao to give effect to the Curacao court's enforcement order. The plaintiffs originally sued Solitron for breach of a contract to establish a business operation in Curacao. The plaintiffs obtained an arbitration award against Solitron that was enforced by a Curacao court. *Id.* at 1314-15; *see also* Ingersoll Milling Machine Co. v. Granger, 833 F.2d 680 (7th Cir. 1987). *Granger* turned on the enforceability of an employment dispute judgment obtained by an employee of Ingersoll's Belgian subsidiary from the Belgian courts. *Id.* at 682-84.

129. 881 S.W.2d 301 (Tex. 1994).

130. *See supra* notes 95-99 and accompanying text.

131. 114 S. Ct. 981 (1994).

132. *Choo*, 881 S.W.2d at 301.

133. *American Dredging*, 114 S. Ct. 988-89.

134. *Choo*, 881 S.W.2d at 306.

135. *Id.*

136. *Id.*

Iran v. Pahlavi,[137] the New York Court of Appeals upheld a lower court's dismissal of a suit brought by Iran against the former Shah and his wife. Iran alleged that the Shah had obtained vast sums of money through bribery, embezzlement, and conversion, and sought to recover those sums, assets purchased with those sums, and exemplary damages.[138] The court dismissed the suit based on its own understanding of *forum non conveniens* without suggesting that federal common law was in any way relevant.[139] The court acknowledged the absence of an alternative forum for the suit, which, under *Gulf Oil v. Gilbert*,[140] renders *forum non conveniens* unavailable. It observed, however, that the Fourteenth Amendment's due process guarantee did not require this view of *forum non conveniens* and therefore left the state court free to take its own approach to the doctrine.[141] Thus, the court applied state law even though the issues raised in the case had significant foreign relations implications. Moreover, it rejected Iran's reading of the Algiers Accords,[142] which Iran claimed were a U.S. Government guarantee of the right to bring actions against the Shah in American courts.[143] Even more significantly, the court questioned the federal government's authority to make such a guarantee in accordance with principles of federalism because this dispute did not involve an area of clear federal authority, such as international claims.[144]

The reasoning in *Pahlavi* is not unique. Other cases have applied state law where no federal court had specifically labelled a matter as federal law.[145] Such cases are hard to reconcile with the emerging

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137. 467 N.E.2d 245 (N.Y. 1984), *cert. denied*, 469 U.S. 1108 (1985).

138. *Id.* at 246-47. Although *Iran v. Pahlavi* and *Republic of the Philippines v. Marcos* both involved foreign government efforts to recover assets allegedly stolen by deposed rulers, *Republic of the Philippines* involved property clearly within the court's jurisdiction, while the assets in *Pahlavi* were scattered. Although this distinction might justify different results on the merits, it does not demonstrate that one case had more or less potential to affect U.S. foreign relations. Similarly, in a California case involving a foreign government agency's effort to obtain relief from problems allegedly caused by a foreign ruler's dishonesty, the state court applied state law to a dispositive procedural issue, and nothing in the opinion suggests that the court saw the case's foreign relations aspects as raising any federal issue. *See* Philippine Export & Foreign Loan Guar. Corp. v. Chuidian, 267 Cal. Rptr. 457 (Cal. Ct. App. 1990).

139. 467 N.E.2d at 247.

140. 330 U.S. 501 (1947).

141. 467 N.E.2d at 246-50 (noting that U.S. Supreme Court had never held *forum non conveniens* required under Fourteenth Amendment).

142. *Id.* at 247, 251-52.

143. *Id.* at 252.

144. *Id.* at 251-53; *see also Chuidian*, 267 Cal. Rptr. at 457 (upholding, without reference to any controlling federal common law, trial court's refusal to vacate stipulated judgment of Philippine court).

145. *See, e.g.*, Board of Trustees of the Employees' Retirement Sys. of the City of Baltimore v. Mayor of Baltimore, 562 A.2d 720, 746 (Md. 1989), *cert. denied sub nom.* Luban v. Mayor of Baltimore City, 492 U.S. 1093 (1990) (upholding Baltimore ordinances against investment in South Africa, distinguishing *Zschernig* as proscribing only "extensive judicial scrutiny and criticism of foreign governments"). The result of this case is somewhat surprising. The court's effort to distinguish *Zschernig* seems disingenuous, because it characterizes the purpose of the ordinances as "ensur[ing] that the City's pension funds would not be invested in a manner that was morally

"foreign means federal" approach discussed in Section A. They are, however, consistent with holdings of the U.S. Supreme Court.

Several Supreme Court decisions post-dating *Zschernig* suggest that cases affecting international relations are not necessarily governed by federal law. *Day & Zimmerman v. Challoner*,[146] for instance, held that "[a] federal court in a diversity case is not free to engraft onto . . . state [conflicts of law] rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits."[147] This was so even though the state conflicts rule would have led to the application of the law of a foreign country that, in the opinion of the court of appeals, had no interest in the controversy.[148] Clearly, the Court considered the international element of the case to be irrelevant. Similarly, in *DeCanas v. Bica*[149] the Supreme Court upheld as constitutional a California statute restricting the employment of illegal aliens[150] despite the federal government's exclusive authority over immigration. It rejected the proposition that any state statute dealing with aliens was *ipso facto* a regulation of immigration[151] and held that, even if the statute had "some purely speculative and indirect impact on immigration,"[152] it was not an unconstitutional exercise of state power absent some preemptive action by Congress.[153] Finding none, it upheld the statute, but remanded to the lower court for its determination whether the statute would somehow directly interfere with the operation of federal

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offensive to many Baltimore residents," *id.* at 746. This purpose would appear to render the ordinances more intrusive into the federal domain than the statute in *Zschernig*, which, even though it was facially innocuous, was held unconstitutional because it provided state judges with the opportunity to make derogatory comments about foreign governments. The Baltimore ordinances, in contrast, were a continuing, formalized criticism of a foreign state. *Trustees v. Baltimore*, then, is a *very* narrow reading of *Zschernig*. Trojan Technologies, Inc. v. Pennsylvania, 916 F.2d 903 (3d Cir. 1990), *cert. denied*, 501 U.S. 1212 (1991), also reads *Zschernig* narrowly. In that case, a Canadian plaintiff challenged a Pennsylvania statute imposing a "Buy American" requirement on suppliers of products for public works projects carried out by any Pennsylvania governmental unit. *Id.* at 904-05. The court rejected the argument that the statute unconstitutionally interfered with the federal foreign affairs power. *Id.* at 913-14. It distinguished *Zschernig* by noting that the statute provided no opportunity for state officials to comment on, or base their decisions upon, the nature of any foreign government and did not permit selective application. *Id.* at 913. The court acknowledged that such procurement restrictions might draw international scrutiny and become the subject of trade negotiations but held such possibilities insufficient to justify ruling the statute unconstitutional. *Id.* Reasoning that Congress had recently refused to preempt such trade restrictions and had demonstrated an interest in eliminating them only on a reciprocal basis, the court concluded that striking down Pennsylvania's statute would amount to an inappropriate judicial redirection of federal foreign trade policy. *Id.* at 906-07, 913-14.

146. 423 U.S. 3 (1975) (per curiam).

147. *Id.* at 4.

148. *Id.* at 3-4.

149. 424 U.S. 351 (1976)

150. *Id.* at 352. The California statute prohibited the employment of aliens where their employment would adversely affect U.S. residents.

151. *Id.* at 352-55.

152. *Id.* at 355.

153. *Id.* at 355-56.

immigration law.[154]

The Supreme Court also limited the scope of the "foreign means federal" approach in *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., International.*[155] In this case, an unsuccessful bidder on a Nigerian government contract sued the successful bidder in federal court, claiming that the successful bidder had bribed those awarding the contract.[156] Although the plaintiff did not seek to disturb the contract itself, in order to prevail it would have had to establish facts rendering the Nigerian Government's award of the contract void under Nigerian law.[157] As *amicus*, the federal government agreed with the defendant that the Court should take an expansive view of the act of state doctrine — the issue should be a case's potential to "touch on 'national nerves,'" and not merely whether the court would have to sit in judgment on the official acts of a foreign sovereign in its own territory.[158]

The Court rejected the federal government's proposed broadening of the act of state doctrine and ruled:

> The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.[159]

Kirkpatrick, then, makes clear that a case's potential for embarrassing a foreign government, thereby affecting American international relations, is relevant only to the actual invalidation of an official foreign act. If no such invalidation is at issue, *Kirkpatrick* holds, any fallout from the case is irrelevant. It is particularly noteworthy that the Court, in declaring this standard, refers not to "Courts *of* the United States" but to "Courts *in* the United States," thereby extending its pronouncement to state as well as federal courts.

Another Supreme Court case bearing on this matter is the recently decided *Barclays Bank PLC v. Franchise Tax Board of California.*[160] In that case, the Court upheld California's method of taxing corporations that did business both internationally and in California.[161] Considering whether California's tax system impaired "federal uniformity in an area

154. *Id.* at 356-65.
155. 493 U.S. 400 (1990).
156. *Id.* at 401-02.
157. *Id.* at 406.
158. *Id.* at 406-08.
159. *Id.* at 409.
160. 114 S. Ct. 2268 (1994).
161. *Id.* at 2271-72.

where federal uniformity is essential,"[162] the Court held that when the only argument for the unconstitutionality of a particular state practice would be that it impaired the ability of the United States to speak with "one voice" in matters involving international commerce, passive indications by Congress that the state practice in question was unobjectionable provided an adequate basis for upholding the practice.[163] The Court reached its conclusion, moreover, despite undisputed evidence that California's taxation scheme had aroused great opposition from foreign governments.[164]

The results in *Day & Zimmerman*, *DeCanas*, *Kirkpatrick*, and *Barclays Bank* suggest some limits on the reach of the "foreign means federal" approach. *Sabbatino* could be read as ousting state law from all cases with the potential for causing foreign policy problems for the United States. *Zschernig* implied that the states were completely excluded from activities bearing on foreign relations; it perhaps also implied that this exclusion was beyond the power of Congress to affect. *Day & Zimmerman*, however, clearly indicates that the mere presence of some international element in a case does not require the application of a federal rule. Similarly, *DeCanas* takes pains to stress the limitations on the federal government's power to deal with aliens despite the relationship of that subject to foreign affairs. *Kirkpatrick* establishes that a case's implications for relations with a foreign government will affect the court's authority to entertain the case only in limited circumstances, whether the court is state or federal. Finally, *Barclays Bank* proceeds on the principle that Congressional acquiescence in a state practice affecting the commercial aspect of foreign relations is sufficient to validate that practice even if its negative effect on American dealings with other countries is demonstrable. Taken together, these cases, along with *Clark v. Allen*, suggest caution in concluding that a state practice with some impact on international relations necessarily trespasses on an exclusively federal preserve. Additionally, because federal common law displaces state law, they likewise undercut the broadest of the arguments concerning the applicability of federal common law in this field. If the states are competent to legislate on at least some matters with international aspects and to hear in their courts cases with some potential impact on foreign governments, then authority over those same matters cannot be limited to federal lawmaking authorities, be they Congressional or judicial. The matters thus cannot be controlled by federal common law.

The foregoing discussion shows that state courts and some federal courts have declined to see the federal common law of foreign relations

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162. *Id.* at 2281 (quoting Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979)).

163. *Id.* at 2282-84.

164. *Id.* at 2283-85 & 2285 n.22.

as a body of law with unlimited reach. In addition to case law, federal statutes assume state competence in some areas affecting foreign relations. Congress has explicitly welcomed state activities affecting foreign trade, for example.[165] Section 4001(a) of 15 U.S.C. provides:

> The Congress finds that . . . those activities of State and local governmental authorities which initiate, facilitate, or expand exports of goods and services can be an important source for expansion of total United States exports, as well as for experimentation in the development of innovative export programs keyed to local, State, and regional economic needs . . . .[166]

Further, 15 U.S.C. § 4721, the statute establishing the United States and Foreign Commercial Service, provides that the Service will "assist[] the coordination of the efforts of State and local agencies . . . which seek to promote United States business interests abroad . . . ."[167] Clearly, Congress assumes the states will play a role in foreign trade, a role they have eagerly accepted. For example, North Carolina maintains "foreign office trade directors" in four foreign cities.[168]

Congress' acceptance of state activity that affects foreign governments goes beyond the area of foreign trade. The Foreign Sovereign Immunities Act ("FSIA")[169] clearly envisions a state role in suits by and against foreign countries — suits that arguably affect U.S. foreign relations. Section 4 of the FSIA presupposes state court involvement by explicitly stating that the standards of immunity established by the FSIA are to apply in state as well as federal courts.[170] Congress' failure to confer exclusive federal jurisdiction in all cases involving foreign governments or their instrumentalities indicates its belief that state courts are competent to hear cases involving foreign governments. Moreover, *First National City Bank v. Banco para el Comercio Exterior de Cuba*[171] and other cases have interpreted the FSIA as requiring courts to apply state liability standards governing private actors in cases where a foreign government defendant is not immune and in which state law provides a rule of liability governing private individuals.[172] This statute, then, represents a Congressional

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165. For a discussion of state and local government activity in the field of international trade, see Jessica V. Carter, Note, *The Role of Local Government in Foreign Trade: The Case of Baltimore*, 15 MD. J. INT'L L. & TRADE 169 (1991).

166. 15 U.S.C. § 4001(a)(9) (1988).

167. 15 U.S.C. § 4721(b)(7) (Supp. V 1988).

168. State of North Carolina International Trade Division, Mission Statement 2 (May 4, 1994) (on file with author).

169. Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602-11 (1988)).

170. 28 U.S.C. § 1602 (1988).

171. 462 U.S. 611 (1983).

172. *Id.* at 620-21, 622 n.11 (interpreting 28 U.S.C. § 1606); *accord* Barkanic v. General Admin. of CAAC, 923 F.2d 957, 959-60 (2d Cir. 1991); Liu v. Republic of China, 892 F.2d 1419, 1425 (9th Cir. 1989), *cert. dismissed*, 497 U.S. 1058 (1990). The issue in *Comercio Exterior de Cuba* was whether the defendant, a corporation created and wholly owned by the Cuban government but juridically distinct from that government under Cuban law, was an alter ego

judgment that the interests of the United States are consistent with state law determinations regarding the liabilities of foreign countries when those countries are not immune from suit.

The cases and statutes discussed in this Section demonstrate that Congress and many courts reject the proposition that any activity affecting foreign relations is forbidden to the states. Correspondingly, they cut against the corollary of that proposition, that all law governing any question affecting foreign relations is necessarily federal. To be sure, no state seems inclined to go beyond certain limits. For example, the New York courts struck down, as intrusions into the federal foreign affairs power, efforts by local and state agencies to sanction South African Airways for its refusal to carry travellers to South Africa who had not obtained South African visas (which were denied to blacks)[173] and to forbid newspapers from carrying ads for employment in South Africa.[174] Similarly, the Illinois courts, again relying on the federal government's exclusive authority over foreign relations, held unconstitutional a statute denying dealers in South African coins a tax exemption otherwise extended to dealers in rare coins.[175]

There is, then, no real controversy over the *Sabbatino* and *Zschernig* holdings at their core. It is their outer boundaries that remain uncertain. Federal and state courts, along with Congress, have envisioned considerable scope for the application of state law in matters involving foreign relations. Thus, despite the decisions discussed in Section A, federal courts do not have blanket authority to ignore state law in cases with international elements.

The difficulties raised in this area, and those caused by the idea that customary international law is federal common law, are not, however, limited to doubtful and poorly considered displacements of state authority by federal courts. Lower federal court decisions claiming federal common law status for customary international law rest their own subject matter jurisdiction on dubious authority. Part V examines the justification for the proposition that this category of suits "arise[s] under the laws of the United States."

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of Cuba for purposes of a FSIA claim based on actions taken by Cuba. *Comercio Exterior de Cuba*, 462 U.S. at 613-21. The Court held that federal law governed this question by analogizing to *Sabbatino*. However, it distinguished this question from the issue of the source of liability in FSIA actions. *Id.* at 622 n.11. *Liu* and *Barkanic* both hold that no federal liability rules exist for FSIA cases, though *Liu* holds that federal law determines choice of law in such cases, 892 F.2d at 1425-26, while *Barkanic* holds that state law must resolve choice of law questions in FSIA cases, 923 F.2d at 959-61.

173. South African Airways v. New York State Div. of Human Rights, 315 N.Y.S.2d 651 (N.Y. Sup. Ct. 1970).

174. New York Times Co. v. City of New York Comm'n on Human Rights, 361 N.E.2d 963 (N.Y. 1977).

175. Springfield Rare Coin Galleries, Inc. v. Johnson, 503 N.E.2d 300 (Ill. 1986).

V. JURISDICTIONAL AND RELATED PROBLEMS OF THE FEDERALIZING APPROACH TO CUSTOMARY INTERNATIONAL LAW[176]

Part III demonstrated that, taken to its extreme, the federalizing approach to customary international law could displace state authority in broad areas of law currently seen as the province of the states, but that a number of state and federal courts have rejected this approach. This Part focuses on the weaknesses of the jurisdictional reasoning in *Filartiga* rather than on that decision's negative policy effects. As noted above, *Filartiga* asserts that customary international law, which it equates with the "law of nations," is within the federal courts' subject matter jurisdiction as part of the "law of the United States."[177] As this Part will demonstrate, however, *Filartiga* was wrongly decided for several reasons. First, *Filartiga* misreads the authorities on which the court bases its jurisdiction. Second, the court's result contradicts several decisions of the Supreme Court that *Filartiga* does not address, let alone distinguish. Finally, literal application of the *Filartiga* rule that customary international law is federal common law would violate the fundamental principle of separation of powers.

A. *Customary International Law as Federal Common Law: Analysis of Supporting Authority*

Although *Filartiga* cites authority to support the argument that customary international law is federal common law, the authorities cited do not support that conclusion. *Filartiga* relies on two types of authority to support its result: case law and the intentions of the Framers of the Constitution, as described by Professor Dickinson. Each of these elements of authority requires separate consideration.

1. Filartiga: *Problems with Its Reading of the Case Law*

Filartiga relies on two admiralty cases, *The Nereide* and *The Paquete Habana*, to support its holding. These cases do not, however, genuinely advance the court's argument. In the first place, a federal court's subject matter jurisdiction in an admiralty case flows from Article III's language permitting Congress to vest the federal courts with admiralty jurisdiction, not from Article III's language regarding cases arising under federal law. Admiralty cases therefore arise in a completely different jurisdictional posture than *Filartiga*, where subject matter jurisdiction does not exist unless the legal rules to be applied are federal.

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176. Much of the discussion in this section draws on Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1210-20, 1251-67 (1988).

177. *See* discussion of *Filartiga*, *supra* text accompanying notes 6-22.

Moreover, the *Filartiga* decision finds no support in early federal admiralty courts' occasional reliance on customary international law because that reliance reflects a pre-positivistic view of a court's relationship to the law it applied rather than an assumption that customary international law was federal law. During the late eighteenth and early nineteenth centuries, American lawyers and judges assumed that federal courts could look to law from three different sources: the law of the United States; local law (i.e., the peculiar local rules adopted by states through legislation or judicial decision on subjects appropriate for local governance); and general law, the body of unwritten law embracing subjects of general interest and sometimes also called common law, or the law of nations.[178]

Importantly, eighteenth- and nineteenth-century lawyers determined the content of this general law using a different approach than do modern American lawyers. Instead of accepting positivist assumptions about the nature of law as an artifact created by judges, jurists of this period saw the content of the general law as an object for "discovery" by judicial inquiry and reflection. As a result, courts did not believe that when they claimed jurisdiction over and decided a class of cases, they also created the law applied to those cases.[179] Judges might discover law by looking to various sources, including decisions by other judges, but general law (common law, law of nations) was natural law, not a product of judicial creation.

It has been clear at least since 1812 that federal courts are not general law courts. The Supreme Court's determination that federal courts lack jurisdiction to hear criminal cases alleging only uncodified offenses under the common law reflects this distinction between the courts' applying and creating law. That point was established in *United States v. Hudson and Goodwin*,[180] where the Court based its conclusion primarily on the bad fit between the "very definite" character of the common law of crimes on the one hand, and the precise, limited delineation of the federal courts' jurisdiction on the other.[181] The Supreme Court adhered to the reasoning of *Hudson and Goodwin* in *United States v. Coolidge*;[182] indeed, though *Hudson and Goodwin* was a criminal case, it continues to be cited as authority for the general

178. *See* Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 26-31 (1952); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984).

179. *See* Fletcher, *supra* note 178, at 1517-18; Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1309-10 (1985); *see also* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18-19 (1842) (noting that court decisions are only evidence of law and that general principles of commercial jurisprudence trump decisions of local tribunals, which "cannot furnish positive rules").

180. 11 U.S. (7 Cranch) 32 (1812).

181. *Id.* at 32-34.

182. 14 U.S. (1 Wheat.) 415 (1816).

proposition that federal courts are not common law courts.[183]

This distinction between application and creation of the general law was also reflected in admiralty cases — admiralty and maritime law and what we would now call customary international law both being seen as elements of the general law or law of nations.[184] This latter point is significant for two reasons. First, because admiralty law and customary international law were both elements of the law of nations, an admiralty court applying an international law rule in an admiralty case was employing a body of law closely connected to the law it was expected to apply. Second, admiralty courts saw admiralty law, not as an element of the "law of the United States," but as a body of law distinct from that of the United States.[185] Because admiralty law was part of the law of nations, admiralty courts, by implication, also saw the law of nations as distinct from the law of the United States.

The distinction between admiralty law and the law of the United States was not merely a matter of background jurisprudential thinking; it governed judicial decisions. In *American Insurance Co. v. Canter*,[186] the Supreme Court faced a challenge to the jurisdiction of an inferior court established by the Legislative Council of the Florida Territory. That court had exercised an element of admiralty jurisdiction, and the case turned on whether the Legislative Council had the authority to vest such jurisdiction in an inferior court that it had created.[187] Resolution of that question depended on the proper construction of the federal act of Congress establishing the Florida Territory and the territory's superior courts.[188] Those courts' jurisdiction, in the language of the act, extended to "all cases arising under the laws and Constitution of the United States."[189]

The Court held that cases in admiralty were *not* cases arising under the laws and Constitution of the United States for two reasons.[190] First, in delineating the areas of federal jurisdiction, Article III listed cases arising under the Constitution and laws of the United States separately from admiralty and maritime cases. Speaking through Chief Justice Marshall, the Court observed that "[t]he Constitution certainly contemplates these as . . . distinct classes of cases; and if they are

183. *See, e.g.*, Milwaukee v. Illinois, 451 U.S. 304, 312 (1981).

184. *See* Dickinson, *supra* note 178, at 26-31; Fletcher, *supra* note 178, at 1517.

185. GRANT GILMORE & CHARLES BLACK, THE LAW OF ADMIRALTY 45 (2d ed. 1975).

186. 26 U.S. (1 Pet.) 511 (1828).

187. *Id.* at 540-43. Resolution of that question depended on the proper construction of the act of Congress establishing the Florida Territory. *See id.* at 541-44. That act established superior courts in the territory, and it was undisputed that the action of the Legislative Council in conferring admiralty jurisdiction upon the inferior court was valid unless the act of Congress had granted that jurisdiction exclusively to the superior courts. *Id.* at 543.

188. *See id.* at 541-44.

189. *Id.* at 545. Thus, the case came down to whether Congress's grant to the superior courts of jurisdiction over cases arising under the laws of the United States included a grant of admiralty jurisdiction. *Id.*

190. *See id.*

distinct, the grant of jurisdiction over one of them does not confer jurisdiction over [the other]."[191] Second, the Court observed that admiralty cases do not, in fact, arise under the Constitution or laws of the United States. Admiralty law pre-existed U.S. law, and courts facing admiralty and maritime cases merely applied that law to the cases before them.[192] Admiralty courts, that is, were not applying the "laws of the United States" when they decided cases; they were applying one element of the general law.[193]

Canter is significant for several reasons. First, in light of the connection in early nineteenth-century jurisprudence between admiralty and the law of nations, to hold that the former was not part of the law of the United States was necessarily to hold the same for the latter. Second, *Canter* demonstrates that a federal court's application of a body of law does not establish that the body of law is part of the law of the United States; federal courts of appropriate jurisdiction certainly applied admiralty law even though, according to *Canter*, it was not "law of the United States." Thus, the fact that a federal court applied international law in a case says nothing about whether that court saw international law as federal law.

How does all this bear on *Filartiga*? That opinion relied in part on *The Paquete Habana* and *The Nereide* to support its result. Yet the federal courts' jurisdiction in those two cases did not depend on the federal nature of the law they applied. Jurisdiction existed because they were admiralty matters. Nor do these cases support *Filartiga's* result due to their application of international law because *Canter* demonstrates that a federal court's application of a body of law does not render that body of law federal. Furthermore, *Canter* necessarily implies that a federal court with jurisdiction can apply the appropriate body of law even if that law is not federal — admiralty courts apply admiralty law after all, even though, per *Canter*, it is not federal law. Viewed according to this logic, the seemingly unequivocal language in *The Paquete Habana* and *The Nereide* equating customary international law with federal law is reduced to mere dictum; such a conclusion was irrelevant both to the courts' jurisdiction and to their capacity to apply international law.

Apart from the foregoing, the language upon which *Filartiga* relied surely was not intended to suggest, even in dictum, that the law of nations, or customary international law, is the law of the United States. For instance, *Filartiga* quotes *The Nereide* to the effect that "United States courts are 'bound by the law of nations, which is a part of the law

191. *Id.*

192. *Id.* at 545-46.

193. *See also* The Scotia, 81 U.S. (14 Wall.) 170, 187-88 (1871) (treating "law of the sea" as element of "law of nations"); G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT'L L. 727, 728 (1989) (arguing that Marshall court viewed international law as related to natural law and distinct from laws of United States).

of the land.'"[194] The opinion in *The Nereide*, however, was written by Chief Justice Marshall, the very same justice who addressed the status of the law of nations in relation to federal law in *Canter*. Given his conclusion in *Canter* that admiralty cases did not arise under the laws of the United States, it seems unlikely that in *The Nereide* Marshall meant to assert that the law of nations was federal law. Moreover, if Marshall had truly meant to label customary international law as the "law of the United States" in *The Nereide*, he would have used language much more precise than the phrase "the law of the land." Marshall, of all judges, hardly would have employed vague terms to demarcate the jurisdiction of the federal courts.

Filartiga also cites language from *The Paquete Habana* to support its decision:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . . *Hilton v. Guyot*, 159 U.S. 113, 163, 164, 214, 215.[195]

This language, however, must be read within the context of the entire opinion, which indicates that the Court never intended to address whether international law was "law of the United States." First, in answering an objection to its appellate jurisdiction in the case, the Court in *The Paquete Habana* carefully analyzed the six grounds for jurisdiction under the relevant statute.[196] The Court found a basis for its jurisdiction in the second,[197] the case being on appeal following a "final sentence[] and decree[] in prize causes."[198] The Court also referred to the fourth, fifth, and sixth grounds for jurisdiction,[199] which in the Court's words "all relate[d] to what are commonly called Federal questions . . . ."[200] This language implies that the Court did not see the basis for its own jurisdiction, the clause dealing with prize jurisdiction, as involving a federal question. Of course, this implication is unsurprising given *Canter's* holding that admiralty cases do *not* arise under federal law.

Other elements of the language used in *The Paquete Habana* suggest that the Court never purported to characterize customary

194. *Filartiga*, 630 F.2d at 887 (quoting *The Nereide*, 13 U.S. at 422).

195. *The Paquete Habana*, 175 U.S. at 700.

196. *See* Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 826, 827-28, *repealed by* Act of June 27, 1988, §§ 2, 5, 102 Stat. 662, 662, 663 (circuit courts of appeals and federal jurisdiction).

197. *The Paquete Habana*, 175 U.S. at 686.

198. § 5, 26 Stat. at 827.

199. *Id.* at 828. These situations included cases that involved the construction or application of the Constitution, the validity or construction of any treaty, or the constitutionality of federal or state laws.

200. *The Paquete Habana*, 175 U.S. at 683.

international law as federal law. First, to describe customary international law as "part of our law" is extraordinarily imprecise language for a court to use when referring to a matter relevant to its jurisdiction. Moreover, the reference to "courts of justice of appropriate jurisdiction" is puzzling. What courts would *not* be courts of appropriate jurisdiction if customary international law were federal law? After all, as noted above, if international law were part of the common or general law, state courts could certainly hear cases involving it. If it were also part of federal law, federal courts could likewise always hear international law cases as long as the amount in controversy was sufficient. Of course, if international law were not federal law, the jurisdictional qualification makes more sense, as federal courts could then apply international law only in diversity cases or, for the reasons discussed above, by reason of the grant of admiralty jurisdiction in Article III.

Finally, the *Paquete Habana*'s citation to *Hilton v. Guyot* reinforces the conclusion that the Court did not mean to suggest that international law was federal law. The plaintiffs in *Hilton*, aliens and French citizens, had sued to enforce a French court judgment against certain New York citizens. The issue for the Supreme Court was whether to enforce the judgment of the French court.[201] The language from *Hilton* cited in *The Paquete Habana* was as follows:

> International law, in its widest and most comprehensive sense — including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation — is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.[202]

This language, however, surely cannot mean that conflicts of law questions arise under federal law. Only three years earlier, in *Huntington v. Attrill*,[203] the Supreme Court had characterized the question of whether the courts of one state are obliged to enforce the penal laws of another as one of "international law."[204] It labelled this international law issue as one of "general jurisprudence," and went on to hold:

> If a suit on the original liability under the statute of one State is brought in a court of another State, the Constitution and laws of the United States have not authorized its decision upon such a question to be reviewed by this court. . . .

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201. *Id.* at 227-28.
202. *Id.* at 163, *cited in The Paquete Habana*, 175 U.S. at 700.
203. 146 U.S. 657 (1892).
204. *Id.* at 683.

> But if the original liability has passed into judgment in one State, the courts of another State, when asked to enforce it, are bound by the Constitution and laws of the United States to give full faith and credit to that judgment, and if they do not, their decision . . . may be reviewed and reversed by this court . . . . The essential nature and real foundation of a cause of action, indeed, are not changed by recovering judgment upon it . . . . The difference is only in the appellate jurisdiction of this court in the one case or in the other.[205]

The *Huntington* Court thus effectively held that questions of "international law," at least in what would now be called its conflicts of law aspect, do not involve the "laws of the United States." The Court had jurisdiction in that case only because it contained a question under the Full Faith and Credit Clause. Justice Gray, who authored both opinions, is unlikely to have intended the language in *Hilton*, which also raised a conflicts of law issue, to overrule *Huntington sub silentio*. Thus, when Justice Gray referred to international law as "part of our law" in *Hilton*, he could not have intended to label it "federal law." Further, if this is true, Gray's use of the same phrase in *The Paquete Habana*, in explicit reliance upon *Hilton*, surely was not meant to confer upon public international law the status of federal law.[206]

Aside from the admiralty cases just discussed, *Filartiga* also relied on *Ware v. Hylton*,[207] which simply does not support the proposition that customary international law is the law of the United States. The trial court in *Ware* derived its jurisdiction from the fact that the plaintiff was an alien and the defendants were citizens of an American state.[208] Whether customary international law was federal law therefore was not before the Court. Second, what *was* before the Court was the treaty between the United States and Great Britain that ended the Revolutionary War; therefore, any references in the case to the law of nations were in the context of treaty construction. The case simply does not address the argument that questions of customary international law are questions of federal law.

In addition, *Filartiga's* reliance on *United States v. Smith*[209] provides no support for the idea that customary international law is federal law. In *Smith*, the Court upheld as constitutional a criminal statute for piracy despite claims that the statute failed to define "piracy"

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205. *Id.* (citations omitted).

206. *Huntington's* determination that conflicts questions are not matters of federal law continues to be the rule. *Day & Zimmerman*, see *supra* notes 146-148 and accompanying text, illustrates this. In that case, the Supreme Court reaffirmed the holding of *Klaxon* that federal courts sitting in diversity must apply the conflicts rules of the states in which they sit. Conflicts rules may thus be "part of our law," according to *Hilton*, but they are still not federal law under *Day & Zimmerman*. *The Paquete Habana's* description of customary international law as "part of our law" therefore does not indicate that customary international law is federal law, and such a conclusion appears even less likely when that case is situated against the background of Justice Gray's earlier opinions in *Huntington* and *Hilton*.

207. 3 U.S. (3 Dall.) 199 (1796).

208. *See id.* at 221.

209. 18 U.S. (5 Wheat.) 153 (1820).

clearly.[210] The Court rejected this argument in holding that the term "piracy" had a well established meaning:

> [t]he common law, too, recognizes and punishes piracy as an offence, not against its own municipal code, but as an offence against the law of nations, (which is a part of the common law,) as an offence against the universal law of society, a pirate being deemed an enemy of the human race.[211]

This quotation does not relate to, let alone support, the proposition that the "law of nations" is part of the laws of the United States. The Court based its jurisdiction solely on the federal statute. Indeed, when it asserts that the law of nations is part of the common law, the Court is actually refuting this proposition because, as the Court had held, the common law is distinct from the law of the United States. Interpreting *Smith* to mean that the law of nations is part of federal law is to ignore *Hudson and Goodwin* and *Coolidge*.[212] *Filartiga* hence must look elsewhere for support.

2. Filartiga *and the Views of the Framers*

The *Filartiga* court claims to have support from the Constitution's Framers, or more precisely, from Professor Dickinson's description of their views. *Filartiga* quotes Dickinson for the propositions that "the Law of Nations is a part of the law of the land to be ascertained and administered, like any other, in the appropriate case"[213] and that "one of the principal defects of the Confederation that our Constitution was intended to remedy was the central government's inability to 'cause infractions of treaties or of the law of nations, to be punished.'"[214]

The court's reliance on Professor Dickinson is problematic. Dickinson uses the term "law of nations" as a synonym for "general law" or "common law."[215] Yet he himself makes clear that *Hudson and Goodwin* and *Coolidge* establish that questions involving the "common law" do not arise under the law of the United States.[216] In other words, Professor Dickinson himself effectively acknowledges that the Supreme Court rejected his view of the relationship between the "law of nations" and the laws of the United States. Moreover, his definition of the law of nations would bring subjects traditionally considered general law within federal law. Thus, under his analysis,

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210. *Id.* at 158-62.

211. *Id.* at 161.

212. *See supra* notes 180-183 and accompanying text.

213. Dickinson, *supra* note 178, at 27, *quoted in Filartiga*, 630 F.2d at 886.

214. 630 F.2d at 886 (quoting Dickinson, *supra* note 178, at 27) (some internal quotation marks omitted).

215. *Compare* Dickinson, *supra* note 178, at 26-33 (explaining law of nations) *with* Fletcher, *supra* note 178, at 1517-21 (explaining concept of general common law).

216. Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States, II*, 101 U. PA. L. REV. 792, 792-95 (1953).

Swift v. Tyson,[217] holding that federal courts were free to ignore state decisions on matters of commercial law, was rightly decided, or rather erred by failing to label commercial law as federal law and by implying that state courts were not obliged to follow federal commercial law decisions. Of course, if *Swift* was right, then *Erie Railroad Co. v. Tompkins*[218] is thrown into doubt — and if *Erie* is doubtful, so is much modern federal jurisprudence.

It is also instructive to consider Professor Dickinson's explanation for the Supreme Court's rejection of the link between federal law and customary international law which he believes would have been correct. He attributes this narrow understanding of the reach of the law of nations to "partisanship."[219] This characterization identifies the second problem with *Filartiga's* reliance on the "views" of the Framers — the disparity of views among the Framers as to the meaning of "the laws of the United States." As Professor Jay has carefully demonstrated, American public figures were sharply divided over the proper extent of federal jurisdiction. The conflict concerned the federal courts' authority to apply not merely customary international law, but the common law generally.[220] While many took an expansive view of the common law jurisdiction of the federal courts, others feared that such a broad grant of jurisdiction to the federal courts would dangerously increase the federal government's authority because it was assumed that federal government authority was coextensive with that of the federal courts.[221] In any case, the members of the founding generation were hardly of one mind on this subject.

Even the authors of *The Federalist* disagreed on this issue. In *The Federalist*, Number Three, Jay argues in favor of a strong federal government by asserting:

> [u]nder the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner — whereas adjudications on the same points and questions in thirteen States, or in three or four confederacies, will not always accord or be consistent; and that, as well from the variety of independent courts and judges appointed by different and independent governments as from the different local laws and interests which may affect and influence them.[222]

This language certainly suggests that Jay favored the federal courts' jurisdiction over cases involving the law of nations.

In contrast, *The Federalist*, Number Eighty, which focuses solely

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217. 41 U.S. (16 Pet.) at 179 (1842).

218. 304 U.S. 64 (1938).

219. Dickinson, *supra* note 216, at 792-95.

220. *See* Stewart Jay, *Origins of the Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1019-13; *see also Smith*, 18 U.S. at 161 (stating that law of nations is "part of the common law").

221. Jay, *supra* note 220, at 1090-91.

222. THE FEDERALIST No. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961).

on the jurisdiction of the federal courts, offers Hamilton's somewhat circumscribed view of federal jurisdiction over matters of customary international law. He wrote:

> It seems scarcely to admit of controversy, that the judiciary authority of the Union ought to extend to these several descriptions of cases. 1st, to all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; 2nd, to all those which concern the execution of the provisions expressly contained in the articles of Union; 3rd, to all those in which the United States are a party; 4th, to all those which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations or to that between the States themselves; 5th, to all those which originate on the high seas, and are of admiralty or maritime jurisdiction; and lastly, to all those in which the State tribunals cannot be supposed to be impartial and unbiased.[223]

The fourth category Hamilton includes could suggest that he saw the Constitution as permitting federal jurisdiction over cases involving customary international law. His argument later in Number Eighty, that federal jurisdiction in cases where foreigners are parties would reduce the likelihood of conflict with foreign states arising from judicial maltreatment of their nationals, further supports this reading.[224]

The final portion of Hamilton's argument, however, completely refutes these impressions. He demonstrates there how the allocations of jurisdiction in Article III accommodate each of his six classes of cases.[225] According to Hamilton, Article III's grant of jurisdiction over cases arising under the laws of the United States corresponds only to the first *two* of his six categories of cases.[226] He did not believe that the laws of the United States provision extends to jurisdiction involving international law cases. He refers to his fourth category of cases only in reference to grants of jurisdiction over cases involving treaties, ambassadors, public ministers and consuls, controversies between two or more states, controversies between a state and citizens of another state, controversies between citizens of different states, and controversies between a state or the citizens thereof and foreign states, citizens, or subjects.[227] Thus, while federal jurisdiction over cases with foreign elements was important to Hamilton, he did not believe that cases involving the law of nations arose under the laws of the United States (if we assume that *The Federalist*, Number 80, represents his views). This point is noteworthy for two reasons. First, while Jay may have believed that cases involving the law of nations arise under the laws of the United States, Hamilton's views were different and hence demonstrate the founding generation's lack of consensus on the question. Second, courts

223. THE FEDERALIST No. 80, at 475 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
224. *Id.* at 476-77.
225. *Id.* at 479-81.
226. *Id.* at 479-80.
227. *Id.* at 480-81.

citing *The Federalist*, Number 80, to demonstrate Hamilton's support for treating the law of nations as federal law, as was done by at least one federal court of appeals, have read that paper quite incorrectly.[228]

For all of these reasons, *Filartiga* stands on shaky ground. The case law cited in *Filartiga* simply fails to support the proposition that customary international law arises under the laws of the United States, and the Framers had no unified view on the question. In short, the authorities *Filartiga* cites do not support its result.

B. *Customary International Law as Federal Common Law: Contrary Authority*

The foregoing discussion demonstrates the scarcity of support for *Filartiga's* argument that customary international law is federal common law. The cases discussed in Section III.B, though inconsistent with that argument, do not explicitly address the connection between the two bodies of law. This Section examines cases that do address the connection between customary international law and federal common law and affirmatively hold that customary international law is *not* federal law.

1. *Pre-*Erie *Cases*

A number of cases decided before *Erie* cast doubt on the ruling in *Filartiga*. Under the logic of *American Insurance Co. v. Canter*, customary international law cases do not arise under the laws of the United States. This result follows because, in 1789, both admiralty cases and cases involving treaties were understood to involve the law of nations. Article III makes separate grants of jurisdiction for those classes of cases, on the one hand, and cases arising under the laws of the United States, on the other. Following Marshall's reasoning in *Canter*, these separate grants of jurisdiction imply that the laws of the United States do not include the law of nations. If they did, separate grants of jurisdiction regarding treaties and admiralty would have been unnecessary because jurisdiction in such cases would have fallen within the law of nations component of the laws of the United States. By including separate jurisdictional grants, the language of Article III renders the two types of cases mutually exclusive: jurisdiction to hear the classes of cases based on the law of nations exists completely apart from jurisdiction over cases arising under federal law. By extension, then, "arising under" jurisdiction does not include cases involving customary international law, a subset of the law of nations.

Several Supreme Court cases in addition to *Canter* address the relationship between customary international law and the laws of the

228. *See* Estate of Marcos, 978 F.2d at 502.

United States in the course of defining the Court's appellate jurisdiction. Section 25 of the Judiciary Act of 1789[229] authorized the Supreme Court to review decisions from the states' highest courts where a state statute or an exercise of state authority was allegedly "repugnant to the constitution, treaties or laws of the United States."[230] Jurisdiction under § 25 hinged upon whether state courts had decided cases involving the law of the United States.

The Supreme Court's application of § 25 in cases involving questions of international law is instructive. In *New York Life Insurance Co. v. Hendren*,[231] the Supreme Court found that it had no jurisdiction to decide the Civil War's effect on a life insurance contract issued by a New York firm upon the life of a Virginia citizen. In doing so, the Court noted that the case did not present federal questions, but rather involved only general law.[232] Because neither party argued "that the general laws of war, as recognized by the law of nations applicable to this case, were in any respect modified or suspended by the constitution, laws, treaties, or executive proclamations, of the United States," federal law was not in issue, and the Court lacked jurisdiction.[233] Thus, in the majority's view, "the general laws of war, as recognized by the law of nations" are not among the "laws . . . of the United States."[234]

The Court took a similar view in *City and County of San Francisco v. Scott*.[235] It found in *Scott* that it lacked jurisdiction to review a California Supreme Court decision regarding the power of the *alcalde* of San Francisco to grant pueblo lands after the American conquest of California, but before California had adopted a state constitution.[236] The Court reasoned:

> This does not depend on any legislation of Congress, or on the terms of the treaty, but on the effect of the conquest upon the powers of local government in the pueblo under the Mexican laws. That is a question of general public law, as to which the decisions of the State Court are not reviewable here.[237]

The Supreme Court's decision in *Wulfsohn v. Russian Socialist Federated Soviet Republic*[238] also reinforces the conclusion that

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229. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (current version at 28 U.S.C. § 1257).

230. *Id.* at 85.

231. 92 U.S. 286 (1875).

232. *Id.* at 286-87.

233. *Id.*

234. Justice Bradley, the lone dissenter, vehemently objected to this view, contending that international law is the law of the United States. *Id.* at 287-88 (Bradley, J., dissenting).

235. 111 U.S. 768 (1884).

236. *Id.* at 769.

237. *Id.* Case law of the time makes clear that the "general law" referred to here is actually the law of nations. *See* More v. Steinbach, 127 U.S. 70, 81 (1888); *see also* Mitchel v. United States, 34 U.S. (9 Pet.) 711, 748-49 (1835) ("[A]ccording to the law of nations, the laws of a conquered or ceded country remain in force till altered by the new sovereign.").

238. 266 U.S. 580 (1924).

customary international law cases do not arise under the laws of the United States. In *Wulfsohn*, the New York Court of Appeals held that the government of the Soviet republic of Russia was entitled to sovereign immunity, despite the U.S. government's refusal to recognize it, because the actual sovereignty of the government was undisputed.[239] Although the case presented a question of international law, the Supreme Court dismissed the appeal "for the want of jurisdiction."[240] In reaching this result, the Court cited § 237 of the Judicial Code,[241] which carried forward § 25's limits on appellate jurisdiction. The Court also relied on *Oliver American Trading Co., Inc. v. Mexico*.[242] *Oliver American Trading* turned on whether sovereign immunity involved some peculiarly federal aspect of the courts' jurisdiction.[243] The Supreme Court concluded that review of the decision under § 238 was not available, holding that it had jurisdiction under that section only where

> there is in controversy the power of the court, as defined or limited by the Constitution or statutes of the United States, to hear and determine the cause. It is not presented where the question of jurisdiction to be decided turns upon matters of general law applicable alike to actions brought in other tribunals. The question of sovereign immunity is such a question of general law applicable as fully to suits in the state courts as to those prosecuted in the courts of the United States.[244]

The Court adhered to this position in *Transportes Maritimos do Estado v. Almeida*[245] by again refusing to review a district court's jurisdictional determination because the case turned on a question of foreign sovereign immunity, which, the Court held, did not present a question of federal jurisdiction.[246]

Thus, the Supreme Court held on five occasions over a period of nearly fifty years that questions of international law are not federal questions.[247] *Filartiga* and its progeny do not explain why they

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239. Wolfson v. Russian Federated Soviet Republic, 138 N.E. 24, 25-26 (N.Y. 1923).

240. 266 U.S. at 580.

241. Act of Sept. 6, 1916, ch. 448, § 2, 39 Stat. 726, 726-27, *repealed by* Act of Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54, 54.

242. 264 U.S. 440 (1924).

243. The reference in *Wulfsohn* to *Oliver American Trading* links the § 25 cases dealing with customary international law to cases decided under § 238 of the Judicial Code and dealing with the same subject. Section 238 permitted district courts' decisions regarding their own jurisdiction to be reviewed by the Supreme Court. Act of Sept. 14, 1922, ch. 305, 42 Stat. 837, 837, *repealed by* Act of Jan. 31, 1928, ch. 14, § 1, 45 Stat. at 54. It had been interpreted as applying only in cases in which some peculiarly federal issue was in question. *Oliver American Trading* was a case in which the district court had dismissed a suit against Mexico on sovereign immunity grounds.

244. *Id.* at 442-43 (citations omitted).

245. 265 U.S. 104 (1924).

246. *Id.* at 105. Like *Oliver American Trading*, *Almeida* turned on the validity of certificates for Supreme Court review of a lower court's jurisdictional determination under § 238 of the Judicial Code. *See supra* note 243.

247. Some of these cases were probably wrongly decided on their facts. *See infra* note 337. Those involving sovereign immunity, addressing as they do the formal relations between the United States and another government in that other government's capacity as a sovereign entity, would

disregard these earlier holdings. Surely, however, decisions of lower federal courts that depart from earlier Supreme Court holdings should be accorded little weight as authority.

2. *The Effect of* Erie *and Subsequent Cases*

It might be argued that the Court's rejection of the concept of general law in *Erie* renders the cases in the preceding section obsolete. This argument brings to mind two responses. First, these cases, like *Erie*, narrow federal courts' jurisdiction. To be sure, *Erie* provided the impetus for the development of the modern concept of federal common law. Generally, however, federal common law has *not* led to federal control of subjects beyond those under at least de facto federal control since 1789, except in cases in which Congress has implicitly directed the courts to act or the Constitution has required a particular outcome.[248] In contrast, extending federal common law status to customary international law would federalize a subject over which the Supreme Court consistently disclaimed control even pre-*Erie*.

Second, the cases discussed above are entirely consistent with *Erie's* positivistic thrust. Those cases hold, as does *Canter*, that customary international law is not the "law of the United States" because the United States did not create it. This emphasis on the source of the authority from which customary international law flows is in perfect accord with *Erie's* central teaching.

Moreover, Supreme Court authority subsequent to *Erie* has not displaced the five cases discussed above. Indeed, most relatively recent cases dealing with these subjects continue to support the view that customary international law is not part of the laws of the United States. *Romero v. International Operating Co.*[249] most strongly supports this position. In that case, the Supreme Court relied on *Canter's* holding that Article III's grant of jurisdiction over admiralty and maritime cases is

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seem to require a federal rule of decision at least as much as *Sabbatino* did. The Court apparently decided, however, that those cases involved nothing more than the sovereign immunity standards of customary international law. From the latter point of view, the decisions make sense. In other words, the Court was correct to the extent it was saying that a case presenting a customary international law issue does not necessarily present an issue of federal law. Where it erred was in treating these cases as presenting only customary law issues; they also presented issues of federalism, which the court failed to consider.

248. Thus, for example, the Court has filled gaps in federal statutes; implemented constitutional protections for which Congress has failed to provide by statute, *see, e.g.*, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 396-97 (1971); and labelled as federal common law subjects effectively controlled by the Supreme Court prior to *Erie* by applying general law principles to cases brought before the Court on jurisdictional bases other than "arising under" jurisdiction. *Compare* Kansas v. Colorado, 206 U.S. 46 (1907) (applying general law principles to resolve interstate river dispute) *with* Hinderlider v. La Plata River Co., 304 U.S. 92 (1938) (recharacterizing general law issue of *Kansas* as federal common law issue). For a fuller discussion, see Weisburd, *supra* note 176, at 1242-49.

249. 358 U.S. 354 (1959).

distinct from its grant of jurisdiction over cases arising under the laws of the United States[250] to reject the plaintiff's claim that his suit under general maritime law arose under the laws of the United States.[251] The Court also argued that treating admiralty and maritime cases as arising under the laws of the United States would permit parties to remove them to federal court even absent diversity.[252] This interference with state participation in the development of admiralty law would have contradicted the longstanding authority of the states in this field[253] as well as the tradition of interpreting federal jurisdiction narrowly so as to avoid interference with state jurisdiction.[254] Though he wrote separately, Justice Brennan agreed with the basic proposition in *Canter* that the separate jurisdictional grants of Article III should not be read as overlapping: "[a] matter affecting an ambassador or a consul is not per se an action 'arising under,' just as it is not per se a maritime action."[255]

Neither the majority's opinion in *Romero* nor that of Justice Brennan supports the claim that customary international law cases arise under federal law. The majority held that admiralty cases do not arise under the laws of the United States. Given the traditional connection between admiralty law and what is now called customary international law, this holding suggests that cases involving customary international law are similarly outside U.S. law. Brennan's separate opinion on this issue notes that the rules applied by American admiralty courts are in fact created either by Congress or the courts — a characteristic not shared by customary international law. Even *Filartiga* acknowledged that this body of law is created by acts of independent countries, individually or collectively, and not by American institutions.

Both the majority and Brennan accept *Canter's* argument concerning the distinct character of the different jurisdictional grants in Article III. This point affects not only admiralty cases, but also customary international law. As pointed out above,[256] *Canter's* approach leads to the conclusion that customary international law is not part of the law of the United States. Brennan, to be sure, differs with the majority by asserting that a given case may satisfy the criteria of more than one heading of jurisdiction. But the argument for the federal law status of customary international law depends on the assertion that Article III's grants of jurisdiction are *not* distinct.[257] To use Justice Brennan's phrasing, the claim that customary international law is the law

250. *See supra* text accompanying notes 186-193.
251. 358 U.S. at 361-65.
252. *Id.* at 371-72, 376-77.
253. *Id.* at 373-75.
254. *Id.* at 379-80.
255. *Id.* at 403 (Brennan, J., dissenting in part and concurring in part).
256. *See supra* text accompanying notes 186-193.
257. *See Canter*, 26 U.S. at 545-46.

of the United States depends on the claim that admiralty cases *are* per se cases arising under the law of the United States.[258]

Finally, Justice Brennan took exception to the majority's opinion because he disagreed with its assumption that the states played a significant role in the fashioning of maritime law. There can be no dispute, however, that the conclusion that customary international law is federal law would affect a vast range of subjects that are central concerns of state law. Therefore, both of the significant opinions in *Romero* cut against the argument that customary international law is federal law.

While *Romero* is the only relatively recent Supreme Court authority bearing directly on the federalizing approach, *Stanford v. Kentucky* and *United States v. Alvarez-Machaín* both have some relevance.[259] In *Stanford*, the Court held that the Eighth Amendment did not forbid the execution of persons for crimes committed when they were as young as sixteen;[260] it also expressly rejected the relevance of other countries' practices with respect to the execution of juveniles[261] despite arguments from *amici* that such executions violated customary international law.[262] In *Alvarez-Machaín*, the Court decided that rules of customary international law regarding international abductions were irrelevant to its determination whether U.S. law enforcement agents violated the United States-Mexico extradition treaty by abducting a Mexican doctor from Mexico.[263] To be sure, neither of these cases squarely addressed whether customary international law binds the federal courts. The Court treated *Stanford* as an Eighth Amendment case,[264] and the kidnapped Mexican in *Alvarez-Machaín* never claimed that customary international law considered apart from the extradition treaty forbade the United States to try him.[265] Both cases, however, suggest the Supreme Court's unwillingness to read customary international law limitations into American law.

Indeed, if one looks for modern authority supporting the position that customary international law is the law of the United States, the best one can find is dictum from *Sabbatino*.[266] The holding in *Sabbatino*, however, was that the act of state doctrine — a rule of domestic law — was a matter of federal law, not that customary *international* law was

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258. *See supra* text accompanying note 255.
259. *See supra* note 85.
260. 492 U.S. at 380.
261. *Id.* at 369 n.1.
262. *See* Brief of Amicus Curiæ International Human Rights Law Group at 33-42, Wilkins v. Missouri, 492 U.S. 361 (1989) (No. 87-6026); Brief of Amicus Curiæ Defense for Children International-USA at 14-63, *Wilkins* (No. 87-6026). *Wilkins* and *Stanford* were consolidated before the U.S. Supreme Court.
263. 112 S. Ct. at 2195-96, 2196 n.15.
264. 492 U.S. at 364-65.
265. 112 S. Ct. at 2195.
266. *See supra* notes 23-32 and accompanying text.

federal law.[267] Far from confirming the status of customary international law as federal law, the Court in *Sabbatino* refused to apply customary international law although it was arguably relevant.[268]

The foregoing discussion demonstrates the weakness of the jurisdictional basis for asserting that customary international law is federal common law. Reliance on admiralty cases such as *The Nereide* and *The Paquete Habana* to support that assertion is fundamentally flawed. The courts in those cases did not address whether cases involving customary international law arise under the laws of the United States. They did not need to, for the admiralty character of these "supporting" cases gave them jurisdiction to apply international law without having to first classify it. Moreover, courts have almost certainly misconstrued the language they cite from those cases as supporting the equation of international law with federal law. In addition, *Filartiga* fails to address *Hendren*, *Scott*, *Wulfsohn*, *Oliver American Trading*, and *Almeida*, cases squarely holding that international law is not federal law. *Romero*, the only modern case to address this issue, directly refutes the idea that federal law includes customary international law. *Stanford* and *Alvarez-Machaín* similarly give little weight to customary international law in cases in which, arguably, it would have been relevant. Even *Sabbatino*, which appears to support *Filartiga*, does so only through dictum. In short, a careful reading of the relevant authorities demonstrates that customary international law is not federal law within the meaning of Article III.

C. *Customary International Law as Federal Common Law and the Separation of Powers*

Because the scope of customary international law is so broad, literal application of the idea that customary international law is federal common law would violate the principle of separation of powers.

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267. *Sabbatino*, 377 U.S. at 425-28.

268. It might be argued that *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba* also supports the argument that international law is federal law because it cites *The Paquete Habana* for the proposition that "international law . . . 'is part of our law.'" *Comercio Exterior de Cuba*, 462 U.S. at 623 (quoting *The Paquete Habana*, 175 U.S. at 700). The issue in that case, however, was whether a corporation owned by the Cuban government should be seen as the alter ego of that government with respect to a claim against Cuba. Federal jurisdiction was based on the FSIA, and the Court referred to international law only in relation to the question of whether the corporation could be identified with the government. *Id.* at 613-23. The case therefore does not address the point at issue in the text. Indeed, its language seems if anything *in*consistent with the idea that international law is part of federal common law. Specifically, the Court held that "the principles governing this case are common to both international law and federal common law, which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies." *Id.* at 623. This language implies that the Court saw international law and federal common law as distinct. An assertion that federal common law is "in these circumstances . . . informed . . . by international law principles," *id.* at 623, is hard to reconcile with the proposition that international law *is* federal common law.

According to the *Restatement of Foreign Relations*: "'International law' . . . consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical."[269] Thus, to say that international law is federal law is to include in the federal law whatever "rules and principles" customary international law imposes on "the conduct of states . . . and . . . their relations *inter se*."

The list of such "rules and principles" is a long one. It includes criteria for determining when an entity is a "state" as that term is used in international law.[270] It arguably includes limits on the right of governments to expropriate the property of foreign nationals.[271] Customary international law clearly forbids states to breach their treaties with one another and determines when treaties may be deemed to have been terminated and when they may be suspended.[272] In addition, it provides rules for identifying the sovereign of a particular territory and for determining territorial boundaries.[273] According to the International Court of Justice, customary international law also strictly limits the authority of governments to use force against one another.[274]

While international law provides rules to govern these situations, the federal courts have declined to review executive determinations regarding each of these subjects and have generally characterized such issues as confided by the Constitution to the political branches of the federal government. Thus, for example, the courts have left it to the Executive to decide whether the United States will recognize a particular entity as a state.[275] Relying on a long history of executive practice and congressional acquiescence, the courts have also concluded that authority to settle American citizens' claims regarding the expropriation of their property by foreign states rests with the President.[276]

Cases dealing with treaty questions reinforce this conclusion, as the courts are unwilling to enforce customary international law rules regarding treaty implementation and termination against the federal Executive. In *Goldwater v. Carter*,[277] the Supreme Court refused to act in response to a claim that the President's treaty termination was contrary to the treaty's terms.[278] Four justices were of the opinion that

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269. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 3, § 101.
270. *See* BROWNLIE, *supra* note 72, at 72-79.
271. *See id.* at 531-45.
272. *See id.* at 604, 616-22.
273. *See id.* at 127-71.
274. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 4, 147 (June 27).
275. United States v. Belmont, 301 U.S. 324 (1937).
276. Dames & Moore v. Regan, 453 U.S. 654, 679-84, 688 (1981).
277. 444 U.S. 996 (1979).
278. *See id.* at 997 (Powell, J., concurring in judgment).

all questions of treaty termination were unreviewable political questions,[279] while one took the position that the particular termination at issue was a necessary incident of the President's recognition of a government and was thus unreviewable as a matter of substantive law because of its link to recognition.[280] In sum, a majority of the Supreme Court took the position that at least some treaty terminations by the Executive could not be reversed by the judiciary[281] despite the customary international law requirement that treaties must be observed[282] — a federal law requirement if customary international law is federal common law. The courts have held other questions regarding the status of treaties to be purely matters for the Executive,[283] despite the fact that, as noted above, customary international law regulates such matters.

Executive determinations regarding U.S. claims to disputed territory[284] and competing territorial claims by foreign governments are similarly binding on the judiciary.[285] Finally, the courts have held unreviewable executive decisions to use force in circumstances having foreign relations effects.[286] Indeed, even *Sabbatino* supported this limited view of judicial authority; it refused to apply customary international law because doing so might have interfered with the workings of the Executive.[287]

The suggestion that customary international law is federal law thus involves a serious paradox. On the one hand, international law purports to regulate the behavior of governments. If it is also federal law, it imposes limits on the U.S. government commensurate with restrictions embodied in federal statutes. The federal courts nevertheless have declared themselves powerless to enforce these restrictions against the federal government; indeed, they have, in a number of cases, held

279. *Id.* at 1002-06 (Rehnquist, J., concurring in judgment).

280. *Id.* at 1006-07 (Brennan, J., dissenting).

281. Applying *Dames & Moore's* rule that the President obtains authority over aspects of foreign affairs by virtue of a longstanding executive practice in which the Congress has acquiesced, it would appear in any case that the President has authority to terminate treaties without action by either the Senate or the whole Congress. This result follows from the long history of unilateral presidential treaty terminations. *See* STAFF OF SENATE COMM. ON FOREIGN REL., 95TH CONG., 1ST SESS., THE ROLE OF THE SENATE IN TREATY RATIFICATION 74-76 (Comm. Print 1977) (listing instances of unilateral presidential treaty terminations).

282. *See* BROWNLIE, *supra* note 72, at 616.

283. The Court has held itself bound by executive determinations that treaties were still in force. *See, e.g.*, Clark v. Allen, 331 U.S. 503, 508-09 (1947); Factor v. Lauenheimer, 290 U.S. 276, 295, 298 (1933); Terlinden v. Ames, 182 U.S. 270, 282-88 (1902).

284. Jones v. United States, 137 U.S. 202, 221 (1890).

285. Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839).

286. Johnson v. Eisentrager, 339 U.S. 763, 788-89 (1950); The Prize Cases, 67 U.S. (2 Black) 635, 665-71 (1863); Simmons v. United States, 406 F.2d 456, 460 (5th Cir. 1969), *cert. denied*, 395 U.S. 982 (1969); Luftig v. McNamara, 373 F.2d 664, 665-66 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 945 (1967); United States v. Hogans, 369 F.2d 359, 360 (2d Cir. 1966).

287. *Sabbatino*, 376 U.S. at 427-33. Professor Burbank has made the same observation. *See* Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEX. L. REV. 1551, 1577 (1992).

themselves bound by executive determinations without regard to their international legal merits.[288] If this judicial deference stems from the separation of powers principle, does it mean anything to say that international law is part of American law? If federal courts will not enforce this body of law against the federal government, to whom shall it apply? The only other bodies to which international law could apply would be foreign governments, but American courts cannot enforce that law against them.[289] In sum, if customary international law binds governments, but American courts are powerless to enforce it against the U.S. government, international law cannot really be federal law.

A number of writers have taken positions inconsistent with this argument[290] but have not fully considered the implications of the scope of executive authority established by the decisions just described. A critical element of the *Erie* holding was the emphasis on the constitutional limits to the *authority* of the federal courts.[291] That case held that federal courts lacked authority to apply "general" law because the Constitution did not vest power to create such law in the federal courts. That the lower courts purported merely to be "discovering" law was, therefore, irrelevant. To make a legal rule is to wield power, and because the Constitution had not granted authority to exercise that power to the federal courts, their assumption of it was unconstitutional.

After *Erie*, rules of nonstatutory law are law only because judges say they are. If judges have no authority to speak, however, they cannot circumvent their lack of authority by claiming, like ventriloquists' dummies, to be passive conveyors rather than creators (as far as the federal system is concerned) of the legal rules they apply. However, constitutional authority for judicial involvement comes into question not only when courts disregard state common law, but also whenever courts intrude upon the powers of the other branches of the federal government. Even if the courts base their intrusions on some body of law, that body of law justifies court action only if the court has some colorable claim to authority in the matter. Yet if the matter falls within the exclusive control of another branch of the federal government, the courts have no such authority. For them to seek to control the matter in this situation is as much an abuse of judicial power as the lawmaking that *Erie* repudiated. Longstanding judicial construction of the reach of executive authority in the area of international relations establishes that an attempt by the federal courts to control foreign policy determinations

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288. *E.g.*, *Simmons*, 406 F.2d at 460.

289. They have not claimed to do so since The Schooner Exchange, 11 U.S. (7 Cranch) 116, 137, 143, 146-47 (1812).

290. *See, e.g.*, Michael J. Glennon, *Can the President Do No Wrong?*, 80 AM. J. INT'L L. 923 (1986); Michael J. Glennon, *Raising* The Paquete Habana*: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321 (1985); Jordan J. Paust, *The President* Is *Bound by International Law*, 81 AM. J. INT'L L. 377 (1987).

291. *See Erie*, 304 U.S. at 78.

in order to enforce international law is such a judicial usurpation. It would be no less a usurpation if the courts claimed "merely" to be "applying" customary international law.

Thus, if customary international law is federal law, it is a peculiar sort of law — often not judicially enforceable against the only entity to which it applies, subject to the control of the American courts, and bound by the rules of customary international law. Of course, there is a way out of this paradox: deny that customary international law is federal law. The courts' unwillingness to apply customary international law as a limit on the federal government makes sense if customary law is not federal law and thus provides no authority for imposing limits. Those rejecting this solution must show how federal law can be understood as including a body of rules that the Constitution forbids the federal courts to enforce.

VI. RESOLVING JUDGE JESSUP'S DILEMMA

The preceding Part argues that customary international law is not federal common law. However, at first glance this view does not address a serious problem noted by Judge Philip Jessup, a former U.S. judge on the International Court of Justice. Jessup observed that *Erie* asserts that state law governs cases in federal courts "[e]xcept in matters governed by the Federal Constitution or by acts of Congress."[292] He pointed out that, if this assertion were true, then state law would determine when and how to apply customary international law. Not only would the Supreme Court be unable to establish authoritatively rules of international law for American courts, but it, and all federal courts, would also have to apply the state courts' views of international law. This state of affairs, warned Jessup, would be unwise.[293]

It would be strange indeed if the Supreme Court were obliged to decide a question of customary international law by applying the version of customary international law enunciated by a state court — particularly if state courts differed over what counted as a norm of customary international law. The oddity of this situation may explain why some commentators and courts have concluded that customary international law must be federal law. Nevertheless, as pointed out in Parts III.B and IV.B, that position cannot be regarded as the current law because it is inconsistent with numerous decisions.[294] Judge Jessup's argument thus presents a dilemma. How can one reconcile *Erie* with the demands of a national approach to international law without treating customary international law as federal common law?

The resolution of Judge Jessup's dilemma is to treat customary

292. Jessup, *supra* note 28, at 740 (quoting *Erie*, 304 U.S. at 78).
293. *Id.* at 742-43.
294. *See supra* parts III.B and IV.B.

international law as neither state nor federal law, but rather as *international* law, that is, law made, not by American states or the federal government, but collectively by the world's nations and available to American courts in appropriate cases. This approach to customary international law is *not* a return to the pre-positivistic conception of law as a "discoverable" body of doctrine that somehow binds human activity without reference to human agency; nor is it an effort to resurrect the concept of general law as enunciated in *Swift v. Tyson*.[295] Instead, this position treats customary international law as analogous to the law of a foreign country. In the same way that courts will, when required by relevant conflicts rules, apply the law of some foreign nation, so they would apply international law in proper cases. Of course, international law is not the law of a foreign sovereign. It is the product of joint lawmaking activities of many sovereigns. This distinction would not, however, be a barrier to its application.

This approach provides a number of advantages. Most importantly, it reflects the reality of customary international law-making. Neither the states, the federal courts, nor the U.S. Congress, create customary international law; it is the product of the practices of many countries, with the United States as a leading actor. Given this fact, it seems undesirable to employ a conceptual framework that labels international law as federal common law when the U.S. government obviously does not create it.

A second advantage to this approach to customary international law is that it corresponds, by and large, to the way that law is treated in the courts. Federal courts do not treat customary international law like state law, but neither do they treat it as the equivalent of federal statutory law binding the Executive. Nor have federal or state courts treated customary international law as federal common law prevailing over state statutes. Indeed, the current uses of customary international law treat it as available to American courts but distinct from American law — a position corresponding to the suggestion that international law be analogized to the law of a foreign country.

This approach yields results different from those that flow from treating customary international law as federal common law. Consider, for example, a criminal defendant facing the death penalty in a state court for a crime committed at age seventeen. The defendant acknowledges that the Constitution does not forbid capital punishment in such circumstances[296] but argues that customary international law does. If the court takes a conflicts of law approach to customary international law, it will ignore the defendant's argument because it is not obliged to apply another lawmaking entity's rules to a matter with

295. *See supra* note 179 and accompanying text.
296. *See Stanford*, 492 U.S. at 380.

which it has an adequate connection.[297] The court will apply its own law because the crime occurred within its borders. If customary international law is federal common law, however, it will supersede state law. The court in the hypothetical would consequently have to determine and apply the rule of customary international law regarding infliction of the death penalty on juveniles. Thus, by treating customary international law as federal common law, the court could find itself forced *not* to apply its own law.[298]

To treat customary international law in the same manner as the law of a foreign state, the courts must abandon the notion that customary international law is the law of the United States within the meaning of Article III and that claims based on customary international law therefore arise under federal law. The number of cases affected need not be large, however, and the imposition of a coherent analytical framework on this area of the law outweighs any disadvantages resulting from a slight narrowing of federal jurisdiction.

This approach nevertheless must face a number of additional objections. The first is that *Erie* literally requires treating *all* cases not involving federal law as state law. The response to this argument is that *Erie* did not involve customary international law. The difficulties of treating customary international law as either federal or state law are different from the issues before the Court in *Erie*; broad dicta from that case ought not control the different problem that customary international law presents.

A more sophisticated version of this objection is that, because *Erie* destroys the notion of a general law existing independently of a sovereign authority, everything that was formerly regarded as general law is, post-*Erie*, state law. In other words, because customary international law was conceived as part of the general law before *Erie*, customary international law is also state law.

This objection misreads *Erie*. In rejecting the concept of general law, *Erie* requires a court to identify the human agency authorized to make law on a particular subject. Yet, *Erie* surely does not stand for the proposition that American states are the only actors to whom we can look to find expressions of positive law that replace general law.

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297. This argument is based on an analogy to Carroll v. Lanza, 349 U.S. 408, 412-13 (1955), a workers' compensation case, in which the Court held that a forum state can ignore the law of another state and apply its own law on the same subject if the forum state has an adequate basis for applying its law.

298. There is authority for the proposition that customary international law forbids the imposition of capital punishment for crimes committed prior to the actor's eighteenth birthday. The Inter-American Commission on Human Rights has stated that, while no customary international norm now prohibits execution of juveniles, such a norm is "emerging." Case 9647, Inter-Am. C.H.R. 147, 170-72, OEA/Ser.L/VII, doc. 17 rev. 3 (1987); *see also* Dinah Shelton, *Note*, 8 HUM. RTS. L.J. 355 (1987) (arguing that there is norm of customary international law establishing eighteen as age of majority for permissible infliction of capital punishment).

For example, in *Hinderlider v. La Plata River Co.*,[299] decided on the same day as *Erie*, the Court applied what it called a federal common law rule regarding interstate rivers. *Hinderlider* derived the rule it applied from earlier cases decided on the basis of general law rules.[300] Thus, just as *Erie* recharacterized a general law issue as a state law matter, so also *Hinderlider* recharacterized a general law issue as a matter of federal common law. Each case, that is, insisted on identifying a human lawmaker as the source of a rule instead of ascribing that rule to general law. The human agency in *Hinderlider*, however, was the federal judiciary, not the states. Read with *Hinderlider*, then, *Erie* can hardly mean that *only* the states can make law on subjects that were previously general law matters.

Accordingly, the best way to read *Erie* is not as woodenly equating general law with state law, but as rejecting general law and insisting that any rule must be attributed to some particular lawmaking authority. This interpretation fits the approach to customary international law suggested in this Part because the human authority that creates customary international law is the collective international community. That community makes law by employing mechanisms as positivistic as those the states employ. Thus, applying rules developed under the authority of the international community hardly amounts to resurrecting the concept of general law. Rather, such an approach incorporates the insight from *Erie*, that human agency creates law, and looks to the appropriate agency to determine a particular law's content.

A second objection to treating customary international law as analogous to foreign law is that, while the federal government does not create customary international law, not all elements of *federal* common law need be federally created. On the contrary, the Supreme Court has occasionally held that even though federal law governs a particular matter, state law should be incorporated as federal law if the law of the state is consistent with federal policy.[301] Could not customary

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299. 304 U.S. at 92.

300. *Hinderlider*, 304 U.S. at 110. The *Hinderlider* court relied on *Kansas v. Colorado* in applying the federal common law rule. In *Kansas* the Court had applied principles of the "common law generally in force throughout the United States" to resolve a dispute between two states over a river. 206 U.S. at 96-98 (quoting Western Union Tel. Co. v. Call Publishing Co., 181 U.S. 92, 101 (1901)). The *Kansas* court, however, was referring *not* to a federal common law, but to the general law that *Erie* later rejected. *See id.*

301. For example, in Kamen v. Kemper Financial Services, Inc., 500 U.S. 90 (1991), the Court ruled that federal law must necessarily govern the question whether persons bringing suit under the Investment Company Act of 1940 against investment companies in which they owned shares must demand relief from the boards of directors of those companies. *Id.* at 97. It also held that the federal courts would adopt as federal law the different states' rules for making such demands absent evidence that a state rule would be inconsistent with the policies embodied in the Act. *Id.* at 108. Similarly, United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) held that the source of law governing the priority of liens stemming from federal lending programs is federal, but that the Court would incorporate state standards into federal law state standards regarding lien priority. *Id.* at 718. The Court considered but rejected arguments that the incorporation of state standards would interfere with federal interests. *Id.* at 726-40.

international law be treated in the same way, acknowledging its nonfederal source while still ensuring that its employment is a federal question?

Responding to this point requires consideration of the significance of labelling incorporated state law as "federal." What is the advantage of inserting a "federal" label if state law is to govern? One suggested answer is that such an analysis clarifies the federal courts' authority to craft their own rule if state law does not adequately protect federal interests, while it also saves the federal courts from duplicating state efforts that are otherwise sufficient.[302]

Under such an approach, treating customary international law as incorporated federal common law is problematic. *Filartiga* does not suggest that customary international law is federal common law in the same sense that incorporated state law is federal common law. Rather, in *Filartiga* customary international law is *of its own force* federal common law, whether or not the federal courts are comfortable with the results of applying customary international law. Furthermore, American federal or state governments are not the primary creators of customary international law; all countries contribute to its creation. "Incorporating" that body of law as federal common law cannot change the fact that the content of the law exists quite independently of the predilections of American courts, in the same way that the law of France or Russia exists quite apart from American judges' evaluations of those nations' laws. In contrast, federal courts *can* control the content of state law incorporated as federal law by refusing to employ state rules that neglect federal interests. A federal court facing a case in which customary international law applies cannot, however, reject the content of customary international law as contrary to federal interests while simultaneously asserting that it is applying that law — indeed, asserting that it is required to apply that law — because customary international law is federal common law. Thus, the analogy of customary international law to incorporated state law is fatally flawed.

A final objection to the suggested solution to Judge Jessup's dilemma arises from the limited authority of federal courts sitting in diversity to create law. *Klaxon Co. v. Stentor Electric Manufacturing Co.*[303] held that a federal diversity court must apply the conflicts of law rules of the state in which the court sits. The *Klaxon* approach to conflicts of law, therefore, seems to limit a federal diversity court to applying customary international law only if it would be applied by the courts of the state in which the federal court sits.

The Court's holding in *Nolan v. Transocean Air Lines*[304] further complicates this problem. Professor Wright has suggested that *Nolan*

302. *See* LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 475 (2d ed. 1994).
303. 313 U.S. 487, 496-97 (1941).
304. 365 U.S. 293 (1961).

stands for the proposition that, if the forum state's choice of law rules require reference to the law of some other state, a federal court may not independently determine the content of the second state's law, but must follow the *forum* state's view of that law.[305] Accordingly, a federal court permitted to apply customary international law by the conflicts of law rules of the state in which it sits would have to accept that state's version of the content of international law. These readings of *Klaxon* and *Nolan* do not avoid the result Judge Jessup feared, *even if* customary international law is the equivalent of the law of a foreign sovereign. For a federal court could apply customary international law only when the state would do so (*Klaxon*), and only according to the state's version of customary international law (*Nolan*).

Even this final objection fails, however. First, Wright reads *Nolan* too broadly. *Nolan* was brought in New York federal district court; New York conflicts of law principles clearly required the application of a California statute.[306] Although California's intermediate appellate courts had previously interpreted that statute, the California Supreme Court interpreted it differently (in dictum) in a decision handed down shortly before the *Nolan* decision in the Second Circuit. The California Supreme Court's interpretation did not come to the attention of the federal appellate court.[307] For this reason, the Supreme Court vacated the court of appeals' judgment and remanded the case to permit consideration of the California Supreme Court's dictum.[308] Specifically, the Supreme Court ordered the federal court of appeals to determine whether the dictum from the California Supreme Court or the older holdings by the intermediate state appellate courts would control in New York courts.[309]

Clearly, this case was not one in which a federal court was bound by one state's construction of another state's law. Rather, the issue was *how* the forum would go about determining the content of the reference state's law. The Court made no suggestion that the forum courts could employ some outlandish means of making that determination — for example, by construing the California statute without considering constructions of the statute given by California's own courts. At most, then, this case holds that a federal court applying the forum's choice of law rules because of *Klaxon* must also employ the forum's method for determining the law of another state as long as the method is reasonable.

Nolan, then, hardly stands for the proposition that federal courts must accept bizarre state interpretations of foreign law. Several other Supreme Court decisions reinforce this narrow reading of *Nolan*. Both

305. WRIGHT, *supra* note 51, at 390.
306. *Nolan*, 365 U.S. at 294.
307. *Id.* at 295.
308. *Id.* at 295-96.
309. *Id.*

Home Insurance Co. v. Dick[310] and *Phillips Petroleum Co. v. Shutts*[311] hold that state courts violate due process of law when they apply their own substantive law to suits involving transactions with which the state has no significant connection.[312] Further, *Sun Oil Co. v. Wortman*[313] suggests that a state court would deny a litigant due process if it purported to apply the law of some other state but misconstrued the law in a way contradicting a "clearly established" rule that had come to the court's attention.[314]

Taken together, these cases necessarily limit *Klaxon* and *Nolan*. If a state court denies due process by applying its own law to a matter, then *Klaxon* can hardly stand for the proposition that a federal court sitting in that state must apply forum law to the matter simply because forum choice of law rules would require that result. Likewise, *Nolan* cannot be read as requiring a federal court to employ the forum's method of interpreting foreign law if that method would lead to interpretations ignoring "clearly established" foreign rules.[315]

These conclusions likewise apply to cases involving customary international law. Suppose a federal court was hearing a diversity case, and one of the parties raised a question of customary international law. *Klaxon* would require the federal court to determine whether, under the conflicts rules of the state in which the case was heard, a state court would treat the matter as an international law question. However, if the state lacked a significant connection to the matter but nonetheless claimed authority to apply local law according to conflicts rules, *Dick* and *Shutts* would require the federal court to disregard the state's determination. Alternatively, suppose the state treated the matter as one involving international law but had enunciated as the relevant rule of international law a formulation much at odds with the general understanding of the issue. *Sun Oil* would require the federal court to

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310. 281 U.S. 397 (1930).

311. 472 U.S. 797 (1985).

312. *Id.* at 816-23; 281 U.S. at 407-08.

313. 486 U.S. 717 (1988).

314. *Sun Oil* determined that no such due process denial had occurred in the case before it by analyzing for itself the rules allegedly misread by the forum. *Id.* at 731-34.

315. This argument has a certain intuitive appeal. Imagine a situation in which the courts of State *A* are obliged to construe the tort law of State *B*. Supreme Court *A* concludes that *B* follows a particular rule. In a subsequent case, the same issue of *B* law arises in the courts of *A*. The *A* trial judge conducts a very thorough review of the law of *B* and concludes that Supreme Court *A* simply misunderstood the law of *B* in the earlier case, and therefore applies a different rule as the law of *B*, supporting her conclusions with careful citations to the law of *B*. Would Supreme Court *A* overrule this determination, insisting that *its* decisions fix the law of *B* for purposes of the courts of *A*? More plausibly, Supreme Court *A* would acknowledge its mistake and recognize that *A*'s courts are not expert, let alone authoritative, as to *B's* law. If this is true, however, the first determination of *B's* law by Supreme Court *A* could never have established a legal rule in *A* regarding *B's* law. If that conclusion is correct, then a federal court sitting in *A* would have no *A* rule regarding *B* law to apply. Finally, if all of the foregoing makes sense with respect to a state's reading of the law of another state, it would seem to make equal sense regarding a state's reading of the law of a foreign country or of international law.

disregard the state's version of the international rule and instead determine the content of the correct rule itself. The Supreme Court's willingness in *Sun Oil* to review state court decisions to determine whether courts below had disregarded those decisions implies that the Court considers itself obliged to compare a forum court's reading of foreign law to its own understanding of the relevant foreign law when it decides *Sun Oil*-type due process claims. While the *Sun Oil* majority concluded that foreign law had not been disregarded in that case, its analysis suggests that a federal diversity court may adopt an understanding of foreign law — or customary international law — different from that expressed by the courts of the state in which the federal court presides.

Rejecting the argument that customary international law is federal common law thus does not necessarily confine the U.S. Supreme Court to a state court's reading of customary international law in diversity cases. For if one assumes that customary international law is distinct from both state and federal law, then the Constitution obliges federal courts, even sitting in diversity, to ignore incorrect state readings of that law and to determine the law's proper content for themselves.

This argument also suggests a basis for Supreme Court review of state cases involving international law not considered in the nineteenth-century decisions discussed in Part V. If a state refuses to apply customary international law in a case in which that law clearly governs, or applies a purported rule of customary international law that clearly distorts the actual rule, the losing litigant can claim she was denied due process of law by analogizing her case to the disregard or misconstruction of another state's law as addressed in *Shutts* and *Sun Oil*.

This approach preserves the federal courts' power to determine the content of rules of international law, and also provides an argument for Supreme Court review of state international law cases. At the same time, it eliminates the objectionable features of the argument that customary international law is federal common law. This approach does not tie the hands of the President because it views customary international law as comparable to the law of a foreign country, not as federal law, which would be binding on the federal Executive. Nor does it automatically displace state law; in cases where customary international law arguably applies, states would still be free to apply their own law if they have a substantial connection to the matter at bar. International law, for example, would not displace state criminal law.

Admittedly, the objectionable features discussed in the foregoing paragraph are currently only of hypothetical concern. Even while applying the rule that customary international law is federal common law, federal courts have not in fact relied on international law to restrain the federal Executive or to preempt state law. Thus, the approach suggested here would not alter present day judicial outcomes with

respect to these subjects; it would, however, eliminate some analytical confusion.

The practical difference between applying the suggested approach and treating international law as federal common law relates to federal court jurisdiction. Litigants would no longer be able to take suits into federal court on the ground that they implicate customary international law.

This concern is not sufficiently serious to justify rejecting the approach put forward by this Section. The relatively small number of litigants adversely affected by this approach must be weighed against the serious analytical problems, and possible practical objections, to treating customary international law as federal common law. Moreover, to the extent that the change in federal jurisdiction is a problem, remedies abound. Most obviously, Congress can enact statutes creating federal causes of action for violations of international law, as it has done with respect to torture, for example.[316] Further, state courts could be used where an alien sues another alien; under the above analysis, U.S. Supreme Court review would be available if the state disregarded clearly established rules of international law.

In short, the approach suggested in this Section preserves the autonomy of the federal courts regarding customary international law while avoiding an analytical method that risks judicial interference with executive authority and/or wholesale displacement of state law. It is also more solidly grounded in authority than the argument that customary international law is federal common law. This approach is therefore the best way to deal with the dilemma posed by Judge Jessup in 1939.

VII. THE LIMITS OF THE FEDERAL COMMON LAW OF FOREIGN RELATIONS[317]

Determining the extent of the federal common law of foreign relations requires a qualitatively different inquiry than that used to determine the jurisdictional status of cases involving customary international law, though the inquiries naturally overlap. As noted above, the basic question regarding customary international law is whether it can be considered federal common law at all. In contrast, *Sabbatino* makes clear that some federal common law of foreign relations exists; the problem is determining what it includes.

Although a number of writers have espoused general theories on the circumstances in which federal courts may generate common law,

316. *See* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C.A. § 1350 (West Supp. 1994)).

317. For a somewhat different approach to the question of when federal law must displace state actions affecting foreign relations, see Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT'L L. 832 (1989).

their views, to put it mildly, run the gamut.[318] Writings on the federal common law of foreign relations provide no exception.[319] This disagreement among commentators suggests that only a careful study of the case law can define the limits of a federal common law of foreign relations.

The federal common law of foreign relations is "pure" common law — legal rules created by courts without reliance on either federal statutes or the Constitution.[320] The Supreme Court explored the limits of this completely nonconstitutional, nonstatutory common law in *Boyle v. United Technologies Corp.*[321] In holding that contractors could rely on federal common law to defend against certain state tort suits,[322] the *Boyle* Court observed that

> a few areas, involving "uniquely federal interests," are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts — so-called "federal common law."[323]

The Court went on to stress, however, that a uniquely federal interest in a particular area by itself will not create federal common law.[324] There must also be either a significant conflict "between an identifiable federal policy or interest and the [operation] of state law," or a situation where "the application of state law would frustrate specific objectives of federal legislation."[325] In addition, the Court noted that where there is a federal interest in a nationally uniform rule regarding an entire body of law, federal law must displace the entire body of state law.[326] In other situations, only particular elements of state law would be preempted.[327]

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318. *See, e.g.*, Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761 (1989); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989).

319. *Compare* Burbank, *supra* note 287, at 1581-82 (arguing that case for application of federal common law rules regarding recognition of foreign country judgments "crumbles to dust" when issue arises in diversity case) *with* Donald T. Trautman, *Toward Federalizing Choice of Law*, 70 TEX. L. REV. 1715, 1735-36 (1992) (calling for federal common law rules regarding recognition of foreign country judgments and suggesting that "[i]n time, all questions involving other countries may come within the sway of federal common law").

320. Given this definition, the following discussion will not address cases holding that, for purposes of applying the FSIA, the effect to be given the juridically separate status of a corporation owned by a foreign government was a matter of federal common law. *See, e.g., Comercio Exterior de Cuba*, 462 U.S. at 622 n.11. Such cases are less relevant to the present inquiry because they are closely linked to statutory interpretation.

321. 487 U.S. 500 (1988).

322. *Id.* at 512-14.

323. *Id.* at 504 (citation omitted).

324. *Id.* at 507.

325. *Id.* (citations omitted) (internal quotation marks omitted).

326. *Id.* at 508.

327. *Id.*

Under the *Boyle* analysis, the reach of the federal common law of foreign relations thus depends upon the scope of the "uniquely federal interest" with respect to foreign relations. Yet in *Sabbatino*, federal law displaced state law where the applicable state rule and the federal rule were apparently identical.[328] This result implies that courts need not determine whether federal and state law conflict in individual foreign relations cases because the uniformity requirement mandates the displacement of an entire body of state law. The courts still must, however, determine the scope of the federal interest. Perhaps surprisingly, the cases suggest that federal common law standards regarding foreign relations apply in only a limited area.

Some elements of this federal interest are easy to identify. Obviously, the interest in uniformity extends to all aspects of this country's political and military dealings with other countries. The federal government's authority over immigration is likewise uncontroversial. *Sabbatino* makes clear that American diplomats' need for maximum flexibility in addressing seizures of American-owned property abroad requires a uniform rule, and *Zschernig* indicates that at least some statutes providing state judges with the opportunity to criticize foreign governments interfere with the federal foreign relations power.

On the other hand, several Supreme Court cases and statutes place limits on this federal interest. *Day & Zimmerman* rejects the argument that federal law automatically governs any international aspect of a case. *DeCanas* recognizes some state authority to take actions affecting aliens despite exclusive federal control of immigration. Similarly, *Kirkpatrick* holds that a case's potential for embarrassing a foreign government does not require state courts to apply the federal act of state doctrine provided that no actual invalidation of some foreign act is at issue. In *Barclays Bank* the Court upheld a state taxing scheme despite its negative effect on U.S. relations with a number of other countries. Moreover, the federal foreign trade statutes discussed above[329] evidence congressional support for state government action to encourage foreign trade, a posture hardly consistent with the idea that any state action involving dealings abroad infringes upon federal prerogatives. The FSIA assumes that state courts will hear cases involving foreign governments and provides for application of state law to determine the liability of foreign governments not immune from suit.[330]

Together, these cases define the federal interest giving rise to the federal common law of foreign relations, and, by extension, limit that common law. Few would dispute that the federal government must control immigration policy and all military and diplomatic dealings with foreign states. Thus, federal law governs questions regarding the formal

328. *Sabbatino*, 376 U.S. at 424-25.
329. *See supra* notes 165-168 and accompanying text.
330. *See supra* notes 169-172 and accompanying text.

exercise of authority by foreign states (*Sabbatino*), and state officials may not base formal decisions, such as court judgments, on general evaluations of the public policies of foreign states (*Zschernig*). State authority, however, is limited only by the requirement that it not directly usurp federal prerogatives. Hence, states may regulate a population also affected by federal immigration law as long as the regulation does not conflict with federal policy (*DeCanas*). State courts are similarly free to hear suits whose outcome could annoy foreign governments provided they do not question the validity of those governments' actions (*Kirkpatrick*). Moreover, the state may apply its own law in suits against non-immune foreign governments (*Comercio Exterior de Cuba*). States may persist in actions that negatively affect U.S. foreign relations, if the actions are clearly within their jurisdiction and Congress acquiesces (*Barclays Bank*). Finally, states may even conduct international trade activities outside of the United States.

What then is the legal standard defining the limits of the federal common law of foreign relations? Foreign relations common law seems to encompass only immigration questions and American dealings with foreign governments in their sovereign capacities.[331] This formulation suggests that federal common law must displace state law in only three types of cases. First, any matter that requires a prior decision about what counts as a foreign state necessarily involves a federal interest, and federal law must therefore control. This federal control is necessary because permitting states to determine for themselves what entities qualify as foreign states could undermine federal control of formal international relations. Second, federal law should control in matters where a foreign state's public policy will be subject to formal judicial evaluation, as this evaluation impinges upon the federal interest in controlling diplomatic contacts. Finally, federal law must control immigration matters.

Cases falling outside these three categories, in contrast, fail to implicate a federal interest, and federal law should not apply, regardless of whether the result of the lawsuit could in some general way affect relations between the United States and a foreign government. This standard makes sense as a matter of principle. In a world of growing interdependence, the activities of innumerable domestic institutions must affect some aspect of foreign relations. Attempts to prevent such effects are likely to be as successful as attempts to command the tide. Further, federalism in the United States is intended to permit different American states to take different approaches to similar problems; to be persuasive, arguments in favor of the United States addressing those subjects with one voice must explain why the advantages of unanimity outweigh the

331. The common law of foreign relations does not involve dealings with foreign states in their capacities as commercial actors, in which cases they would be deprived of sovereign immunity under the FSIA.

system's basic assumption that local autonomy is generally desirable. To be sure, all parties concerned must clearly understand which institution within the United States has the last word in dealings with other governments. The standard suggested above preserves federal government control over foreign relations, particularly by the Executive, by forbidding states from taking their own official positions regarding formal acts of foreign governments, including positions based on evaluations of the validity or desirability of foreign governments' policies. This standard also forbids states from dealing directly with foreign nationals in their capacities as aliens. It thus provides the federal government with the authority required to deal with foreign governments and to control access to the United States, while it also acknowledges the impossibility of preventing all state government actions that in some way touch on foreign relations.

Two other points should be noted about the proposed standard. First, the statement that cases of the suggested types implicate federal common law does not suggest that the federal courts will themselves craft all the rules necessary to resolve such cases. Given the nature of the cases, federal courts will probably create a choice of law rule to ensure that (where foreign sovereign immunity does not bar the suit) courts apply the body of law most appropriate for such cases. It would rarely be appropriate for the federal courts to fashion substantive liability rules. The importance of the interests involved, however, might well require those courts to frame choice of law rules ensuring the application of a rule created by either the Executive Branch, the law of a foreign country, or customary international law.

The second point clarifies the last element of the first: in some circumstances the federal common law of foreign relations will require the application of customary international law. In such a case, the court would have subject matter jurisdiction not because customary international law was involved, but because the legal standard described above was satisfied. Nonetheless, given the thrust of the arguments in Parts V and VI, it is important to make clear that federal courts will have jurisdiction in some cases only because federal common law is involved, and that customary international law may provide the rule of decision in these cases. It is equally important to stress, however, that federal common law does not govern in such cases *because* customary international law provides the rule of decision.

An illustration may help clarify these last two points. Imagine that Plaintiff, the owner of a long-distance fishing vessel, brings suit to collect on a policy insuring the vessel against "unlawful seizures." Suppose the vessel's catch is seized by the Navy of Foreign Country *X*, which is not a party to the 1982 Law of the Sea Convention, 490 miles from *X's* coast. To decide the case, the court must determine if the act of state doctrine applies. If the court does not apply that doctrine, it must necessarily determine whether the action of the *X* Navy was an

"unlawful seizure." That is, it must formally evaluate the public policy of a foreign state. According to the legal standard advocated in this Part, this case would present an issue of federal common law. Customary international law is the only source of legal rules by which to evaluate that policy because the public policy in question involves actions on the high seas not regulated by treaty. As explained above, the only federal decision would be a determination to apply customary international law to the case. Drawing on experience in determining rules created by other nonfederal lawmaking authorities, the court would then determine the content of that body of law. Again, federal jurisdiction exists in this scenario not because it might involve customary international law, but because it must involve the evaluation of a foreign sovereign's public policy.

How do the cases discussed in Part IV fare when measured against this standard for federal common law? The result in *Republic of Iraq*, which required that federal law govern the enforceability of a foreign decree purporting to confiscate property located within the United States, seems sound. *Republic of Iraq* involved the evaluation of the legal effect of a foreign sovereign's official act and as such should rest on federal law. Under this standard, however, the other cases discussed in Section III.A were wrongly decided.

This conclusion is most obvious with respect to *Gilbertson*, *Tahan*, and *Chick Kam Choo*. The first two cases involved the enforcement of foreign court judgments; the last addressed the question of whether federal rules regarding *forum non conveniens* govern in state maritime cases involving foreign countries. None of these cases raises issues regarding U.S. dealings with foreign sovereigns or involves any evaluation of foreign government policy. They would thus offer no basis for displacing state law.

Republic of the Philippines v. Marcos is also questionable. The court in that case gave several reasons for its conclusion that federal common law governed: the Republic's claims required determinations directly and significantly affecting the foreign relations of the United States;[332] the action was one by a foreign government against its former head of state; the suit was intended to regain property obtained by the defendant while he was head of state; and it involved a request by a foreign government to freeze assets held within the United States.[333] The court did not rely on Marcos's official position as a justification for entertaining the suit; on the contrary, it stressed the private character of the acts of which Marcos was accused in explaining the unavailability of the act of state defense.[334]

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332. *Republic of the Phil.*, 806 F.2d at 352. The court was considering whether it had jurisdiction under the Constitution, federal law, or treaties. *See id.* at 352-53.

333. *Id.* at 354.

334. *Id.* at 357-60. To the extent that scrutiny of Marcos's public acts was in question, the standard for federal common law would arguably be satisfied.

At least some of the court's bases for its conclusions here are clearly inconsistent with the proposed standard. That a legal matter could affect U.S. relations with a foreign state, for example, does not require courts to apply federal law.[335] Likewise, the fact that the case pits a foreign state against its former ruler does not require application of federal law. After all, if the positions were reversed and the deposed ruler sued the foreign state, *Comercio Exterior de Cuba* makes clear that, given FSIA permission to proceed at all, federal law would not provide the substantive liability standards. Why would the state's posture as the plaintiff rather than the defendant alter the law to be applied? Finally, the Philippines' request for equitable relief did not somehow implicate federal law. The Philippines did not argue that its decree had, of its own force, a legal effect in the United States. On the contrary, the Philippines based its prayer for an injunction on the usual rules required for obtaining equitable relief in American courts.[336] If the issue had simply been the effect appropriately given to some foreign government action, then, under *Republic of Iraq*, a federal question would have been presented. Here, however, the foreign government's position was no different from that of a private victim of fraud, and it sought only the relief normally available to such victims. In short, this case did not implicate any interest that Congress or the Supreme Court has indicated must be controlled by federal law and thus would not properly arise under the federal common law of foreign relations.[337]

The *Sequihua* holding also conflicts with the standard applied here. The *Sequihua* plaintiffs did not seek any sort of legal evaluation of a foreign government's acts. Moreover, the relief they sought did not require the court to nullify any act by that government. To be sure, Ecuador did not want the suit to proceed; however, a suit's potential to annoy a foreign government or even to complicate the international relations of the United States is not sufficient to implicate the federal common law of foreign relations under the standard set out in this

335. *See supra* notes 160-164 and accompanying text.

336. *Republic of the Phil.*, 806 F.2d at 351-52.

337. The *Republic of the Philippines* litigation did include one federal element, however, the issue of head of state immunity. *Id.* at 360. The FSIA arguably indicates a congressional determination that federal law should govern international immunity questions. Further, since judges must evaluate the official acts of foreign states in making immunity decisions, federal law should control these issues even under the suggested standard for the federal common law of foreign relations. Thus, if Ferdinand Marcos had raised an immunity claim, federal law would govern. However, on the facts of the case, this federal element is irrelevant because it would be raised as part of a defense. Jurisdiction in *Republic of the Philippines* was based on 28 U.S.C. § 1331, not on the FSIA. *See id.* at 352. Under § 1331, the federal basis for the claim had to appear on the face of the complaint, not in the defendant's pleadings. *Id.*

The notion that international immunity cases involve the federal common law of foreign relations suggests that *Wulfsohn* was wrongly decided. *Wulfsohn* held that sovereign immunity raises no federal questions and thus provided no basis for Supreme Court review of a state decision. *Wulfsohn*, 266 U.S. at 580. The error in *Wulfsohn* was more its failure to see the federal element in the facts before it, rather than its failure to see international cases as raising federal questions generally.

Section.[338]

Most of the lower court decisions discussed in Section IV.B satisfy the legal standard suggested here. *Solitron*, *Granger*, *Choo*, and *Trojan Technologies* involve neither immigration questions nor formal challenges to the actions of foreign governments. *Chuidian* and *Republic of Iran* both were decided on procedural grounds that involved none of the considerations informing the federal common law of foreign relations as defined in this Part. *Zeevi* and *Baltimore City*, however, would require the application of federal law under the standard set out herein and thus claim too much for the states. *Zeevi* raises the same concerns as *Republic of Iraq* because it involves the confiscatory and discriminatory acts of a foreign government, concerns of federal rather than state policy. *Baltimore City* is also inconsistent with the standard provided in this Section. The anti-apartheid ordinance at issue there clearly amounted to a continuing criticism of a foreign government's public policy; the court even noted that the motive behind the ordinance had been public objection to South Africa's policies.[339] In upholding the ordinance, the court not only failed to apply the standard suggested in this Article but also ignored *Zschernig's* prohibition on state criticism of foreign governments.[340]

Congress and the Supreme Court have made it clear that the states have broad authority to act on issues with foreign relations elements. Unless a case raises some question as to an entity's status as a foreign sovereign, requires an evaluation of the actions of a foreign sovereign in its sovereign capacity, or involves immigration narrowly defined, it raises no questions under federal common law.

VIII. CONCLUSION

The *Filartiga* case holds that customary international law is federal common law. *Sabbatino* holds that there exists a federal common law of foreign relations that supplants state law with respect to the act of state doctrine and, by implication, with respect to other subjects as well. *Zschernig* reinforces *Sabbatino* by holding that state courts, by addressing certain subjects involving international relations, unconstitutionally intrude upon the federal government's authority.

Taken together, these cases form the underpinnings for the

338. Perhaps surprisingly, the *Grynberg* case may satisfy the suggested standard for applying federal law. The plaintiff sought remedies that would have required the court either to violate Kazakhstan's sovereignty or to determine the validity of Kazakhstan's exercise of sovereignty within its own borders. *Grynberg*, 817 F. Supp. at 1359. It is likely that only federal law could create these remedies. Claims that federal law has done so, however, are so frivolous that they cannot support jurisdiction under 28 U.S.C. § 1331.

339. *Baltimore City*, 562 A.2d at 737, 746.

340. The *Baltimore City* court had distinguished *Zschernig*, reasoning that the statute in that case required ongoing case-by-case examination of foreign state practices whereas the Baltimore ordinance was only a "single, general decision." *Id.* at 746.

contemporary federalization of nontreaty international cases. This approach is cause for serious concern. In particular, *Filartiga* and *Sabbatino/Zschernig*, taken to their logical extremes, would displace state authority in broad classes of cases. Numerous state and federal courts, however, have taken positions inconsistent with this broad conception of federal authority in nontreaty international cases. This Article demonstrates that such federalization rests on a shaky jurisdictional basis and that *Filartiga* was wrongly decided. More importantly, this Article argues that courts need not federalize customary international law in order to avoid the serious problems that were the impetus for the creation of the federalizing approach. In place of this mode of analysis, the Article suggests different standards for evaluating claims that particular subjects are governed by the federal common law of foreign relations.

By adopting this federalizing approach, the courts have placed themselves in the position of Pandora just after she opened the box and just before the contents began to escape. Aside from being unjustified and unnecessary, the theories the federal courts have employed in seeking to control international cases will, at best, involve them in the resolution of disputes outside of their competence and, at worst, generate judicial answers to questions affecting the foundations of U.S. foreign relations. Surely basic foreign policy is the one area that the courts can least usefully address. Particularly where it is argued that we should substitute international standards for state law on subjects traditionally controlled by American states, change should occur through debate in fora accountable to the electorate rather than through actions by countermajoritarian courts. Any judicial determination of these issues, though justified by the modes of analysis criticized in this Article, is illegitimate in the context of American political values.

International issues will play an increasingly important role in American political and economic life as a result of greater international interdependence. American courts will confront increasing numbers of cases with international elements; how the courts should deal with such cases is simply too important a question to leave to the judges. In any event, the courts must employ in these cases a stronger analytical framework than any they have yet developed. Simply treating all such cases as involving federal common law will not suffice.